Court File No. 08-CL-7878

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OF ARRANGEMENT OF UNIVERSAL SETTLEMENTS INTERNATIONAL INC.

Applicant

BRIEF OF AUTHORITIES OF THE APPLICANT, UNIVERSAL SETTLEMENTS INTERNATIONAL INC. (Bare Trust Motion – Returnable March 16, 2016)

March 11, 2016

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Court of Queen's Bench of Alberta

Citation: Kerr Interior Systems Ltd. (Re), 2011 ABQB 214

Date: 20110330
Docket: 0703 14357
Registry: Edmonton

2011 ABQB 214 (CanLII)

Between:

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

And In the Matter of the Plan of Compromise or Arrangement of Kerr Interior Systems Ltd. and Composite Building Systems Inc.

Memorandum of Decision
of the
Honourable Madam Justice J.E. Topolniski

I. Introduction

[1] This case concerns the court's jurisdiction to authorize debtors to call a further meeting of creditors to reconsider a plan of arrangement (the "Plan") made pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") after court sanction and part performance. The Plan called for payment of $2,600,000.00, including a first installment of $260,000.00 (the "Payment").

[2] Kerr Interior Systems Ltd. ("Kerr") and Composite Building Systems Inc. ("Composite") (collectively the "Debtors") obtained an initial *CCAA* order granting them the usual stay of proceedings and protections on November 7, 2007 ("Initial Order"). Kerr's primary business is the supply and installation of commercial steel stud and drywall load bearing frames. Composite was in the business of fabricating the steel panels installed by Kerr, but ceased operating and transferred its assets to Kerr sometime between the fall of 2009 and the spring of 2010. It is unclear whether Composite is back in business today.

[3] The restructuring followed a fairly typical course of proceedings under the *CCAA*. There was a period of time dedicated to reorganization and formulating the Plan, followed by a favourable creditor vote and an order sanctioning the Plan (the "Sanction Order"). The restructuring went sideways when the Debtors defaulted after making the first of four instalment payments due under the Plan.

[4] Claiming that an unexpected downturn in the economy, difficulty collecting accounts receivable, the strain of servicing secured debt, and the obligations of a related entity (that is not part of the *CCAA* proceeding) have created insurmountable impediments to their ability to carry on in business and to satisfy their obligations under the Plan, the Debtors want to present another offer to their creditors. If successful in their bid for another creditors' meeting, they propose to ask their creditors to accept a global payment of $520,000.00 (comprised of the Payment and an additional $260,000.00 to be paid at a later unspecified date). The Debtors are cognizant that they can pursue restructuring under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 or by making a further *CCAA* filing, but they consider those avenues too expensive and unnecessary.

[5] In a rather cursory report to the court, BDO Canada Limited (the "Monitor") expressed the view that the Debtors appear to be acting in good faith and their application "does not seem to be unreasonable" in light of economic conditions.

[6] Two creditors oppose the application, Winroc, a division of Superior Plus LP ("Winroc"), and Descon Mechanical Protostatix Engineering. A third creditor, Kenroc Building Materials Ltd. ("Kenroc"), voiced support for Winroc's position (collectively the "Opposing Creditors"). The Opposing Creditors argue that the court does not have jurisdiction to call a further meeting of creditors at the post-sanction stage of the proceedings and, in any event, the relief sought is a collateral attack on the Sanction Order. They submit that to authorize a further meeting of the creditors would open the floodgates to such applications and result in uncertainty in *CCAA* proceedings.

[7] There are no reported cases directly on point. The outcome of this application hinges on statutory interpretation and the analysis of reported cases involving analogous situations.

II. The Issues

[8] The following two issues arise on this application:

1. Does the court have jurisdiction to call a further meeting of creditors following the court's sanctioning of the Plan?

2. If yes, should the court direct a further meeting of creditors on the facts of this case?

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III. Factual Context

[9] On January 31, 2008, the Debtors' unsecured creditors voted in favour of the Plan, which provided for a global payment of $2,600,000.00 to be paid in four instalments of varying amounts. On the application for court approval of the Plan, Kenroc and Winroc were unsuccessful in arguing that they should not be listed under the Plan as unsecured creditors but rather as secured creditors with builders' lien claims in Saskatchewan or, alternatively that they should be put in a separate voting class and, in any event, were entitled to the $150,000.00 paid into court by a third party to discharge their builders' liens. On April 4, 2008, Bielby J. (as she then was) granted the Sanction Order (2008 ABQB 286, 449 A.R. 185).

[10] Kenroc and Winroc appealed the Sanction Order to the Alberta Court of Appeal, which ruled (2009 ABCA 240, 457 A.R. 274) that they met the test for classification as secured creditors (by way of lien or trust) and that they were entitled to the $150,000.00 that had been paid into court. The Sanction Order and Plan otherwise remained unaffected.

[11] The Debtors made the first instalment payment under the Plan, the $260,000.00 Payment, but failed to make the second instalment of $720,000.00. They have since unsuccessfully sought informal creditor approval to alter the Plan. One year later and despite the Debtors' default, no creditor has sought to vacate the stay of proceedings.

[12] In November 2007, when the Debtors crafted their proposal to the creditors, their combined value was $2,700,000.00, comprised of accounts receivable ($1,900,000.00) and other assets ($800,000.00). They considered that an offer of $2,400,000.00 (or 50 cents on the dollar) was reasonable for all concerned. At the creditors' meeting, they topped up the offer by $200,000.00, offering a global payment of $2,600,000.00. The creditors agreed to that deal.

[13] What is known of the Debtors' affairs since the Sanction Order includes the following:

(a) Kerr had 13 to 15 salaried employees in 2008-2009. That number increased to 50 by the fall of 2010.

(b) The Debtors' combined 2008 revenue was $14,000,000. Profits were two to three percent.

(c) Kerr's asset value in 2009 was $4,800,000.00. The Debtors' combined revenue in 2009 was $8,000,000.00. Kerr enjoyed a $167,055.00 profit, while Composite lost $571,307.00 that year.

(d) By May 31, 2010:

(i) Composite was out of business;

(ii) Kerr had revenue of $6,500,000.00, with a profit of $79,809.00;

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(ii) Kerr's accounts receivable stood at $1,790,000.00, $600,000.00 to $700,000.00 of which likely was stale dated. Kerr considers all but $100,000.00 of its three major accounts receivable (totalling $585,000.00) to be potentially collectible; and

(iv) $2,200,000.00 of Kerr's accounts payables are owed to related parties, either to Composite or numbered companies owned or controlled by Kerr's shareholders.

(e) At present, Kerr has work in progress and is cautiously optimistic about future revenues. It is unclear whether Composite is operating again.

[14] The Debtors point to the obligations of 1005559 Alberta Ltd. ("1005559"), a related company, as another impediment to their ability to fulfill the terms of the Plan. They submit that the following transactions are germane to the present application:

(a) 1005559 borrowed $3,900,000.00 to buy and renovate a building for the Debtors' use (the "Building"). Of that amount, $3,000,000.00 was still owing at the date of the Initial Order. 1005559 sold the Building for an unknown sum. It also created a $100,000.00 builders' lien fund for persons claiming for work done on renovations to the Building.

(b) 1005559 pledged its assets in favour of the Royal Bank of Canada under a general security agreement to secure a $1,800,000.00 loan to the Debtors (the general security agreement subsequently was assigned to a takeout financier).

(c) 1005559 granted a $2,000,000.00 mortgage to an investor group that had threatened litigation. The court was not advised as to the composition of this investor group or the party threatened by litigation.

[15] Darryl Wiebe, a shareholder, director and officer of Kerr, was questioned about why Kerr wanted to reduce the Debtors' obligations under the Plan when it had saleable assets to fund the Plan and the economy was improving. His response was: "[w]ell, frankly we'd like to get it out of our hair."

IV. Legislative Context

[16] Sections 4 to 7 and 11 of the *CCAA* are relevant to this application.

[17] Section 4, which concerns the court ordering a meeting of creditors to consider compromises with unsecured creditors, reads:

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> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[18] Section 5 is identical except that it concerns a compromise or an arrangement between the debtor company and its secured creditors.

[19] Section 6 deals with court sanction of compromises. It outlines a number of restrictions on when a plan of arrangement can be sanctioned, none of which are relevant to this inquiry. However, ss. 6(1)(a) is of relevance. It refers to modification of a proposed compromise or arrangement at a meeting of creditors, stating:

> 6(1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be - other than, unless the court orders otherwise, a class of creditors having equity claims, - present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding
>
> > (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and ...

[20] Section 7 concerns the adjournment of creditors' meetings when amendments to a compromise or plan of arrangement are proposed. It reads:

> 7. Where an alteration or a modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, the meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and those directions may be given after as well as before adjournment of any meeting or meetings, and the court may in its discretion direct that it is not necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

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[21] Section 11, which describes the court's plenary jurisdiction, provides that:

> 11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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V. Analysis

[22] Statutes are to be interpreted purposively and contextually. The words used are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the legislation, its object and with Parliament's intention (***Re Rizzo & Rizzo Shoes Ltd.***, [1998] 1 S.C.R. 27 at para. 21, 221 N.R. 241; ***Bell ExpressVu Limited Partnership v. Rex***, 2002 SCC 42 at para. 26, [2002] 2 S.C.R. 559). Every word is presumed to make sense and to have a specific role to play in advancing the *CCAA*'s purpose (***Placer Dome Canada Ltd v Ontario (Minister of Finance)***, 2006 SCC 20 at para 45, [2006] 1 SCR 715, citing R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at p. 159).

[23] The *CCAA* is remedial legislation. Its goals include the following:

(i) permitting debtors to continue in business and, where possible, avoid the social and economic costs of liquidation (***Century Services Inc. v. Canada (Attorney General)***, 2010 SCC 60 at para. 15);

(ii) balancing stakeholder interests (***Nova Metal Products Ltd. v. Comiskey (Trustee of)*** (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.); ***Air Canada (Re)*** (2004), 47 C.B.R. (4th) 189 (Ont. S.C.J. (Commercial List)); and

(iii) protecting creditors' interests and permitting an orderly administration of the debtor's affairs (***Meridian Development Inc. v. Toronto Dominion Bank*** (1984), 53 A.R. 39, 52 C.B.R. (N.S.) 109 (Q.B.)).

(iv) rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation (***Century Services Inc.*** at para. 18).

[24] In this vein, Parliament is said to have understood in adopting the *CCAA* that liquidation of an insolvent company is harmful for most of those it affects, notably creditors and employees. Corporate reorganization under the *CCAA* serves the public interest by facilitating corporate survival (***Century Services Inc.*** at paras. 17 and 18).

[25] Proceedings under the *CCAA* are designed to be flexible and responsive, with a view to providing fairness, certainty and stability for the stakeholders. The *CCAA* is to be liberally interpreted to achieve those ends.

[26] *CCAA* jurisdiction is conferred on superior courts vested with inherent and equitable jurisdiction. The present jurisprudential trend is for courts to employ their inherent and equitable jurisdiction only as a tool of last resort when the language of the *CCAA* cannot be interpreted to anchor an intended measure to be taken in the *CCAA* proceedings (G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41 at 42, cited in ***Century Services Inc.*** at para. 65).

[27] Extensive amendments to the *CCAA* in 2008 (2007, c. 36) codified various measures previously undertaken by the court through the exercise of what was referred to in ***Century Services Inc.*** at paras. 62 and 63 as "creative use of authority" and "judicial innovation;" for example, imposing priority charges for critical suppliers or debtor in possession ("DIP") financing (now termed "interim financing") and releasing claims against third parties.

[28] With these contextual considerations and directives in mind, I now turn to an analysis of ss. 4 to 7 and 11 of the *CCAA* and the relevant authorities in order to assess whether this court has the discretion to call a further meeting of the Debtors' creditors and, if it does, whether the court should exercise that discretion in the circumstances of this case.

[29] Calling a meeting of creditors pursuant to s. 4 or 5 is discretionary. A refusal to summon a creditors' meeting often is attributable to the court's determination that the compromise or plan of arrangement is contrary to the creditors' interests (***Re Avery Const. Co.***, [1942] 4 D.L.R. 558, 24 C.B.R. (3d) 17 (Ont. S.C.)), it is doomed to failure due to a lack of creditor support (***Re Fracmaster***, 1999 ABQB 379, 11 C.B.R. (4th) 204, aff'd 1999 ABCA 178, 11 C.B.R. (4th) 230), or there is no reasonable chance the debtor will be able to continue in business (***First Treasury Financial Inc. v. Cango Petroleums Inc.*** (1991), 78 D.L.R. (4th) 585, 3 C.B.R. (3d) 232 (Ont. Gen. Div.)).

[30] The court's sanction of a compromise or plan of arrangement under s. 6 also is discretionary. A compromise or plan of arrangement is enforceable only if and when sanctioned by the court (***Cable Satisfaction International Inc. v. Richter & Associés Inc.*** (2004), 48 C.B.R. (4th) 205 (Que. S.C.)), although court sanction is not necessary to bind the parties to an inter-creditor agreement in a compromise or plan of arrangement (***Re Air Canada*** (2004), 2 C.B.R. (5th) 4 at para. 6 (Ont. S.C.J.)).

[31] Section 6 expressly permits court sanction of a compromise or plan of arrangement amended at the creditors' meeting, so long as the required majority of those voting in person or by proxy at the creditors' meeting agreed to the amended plan. It is clear from this section that

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amendments to the plan may be proposed at the meeting and the plan as amended may be put to a vote.

[32] Pursuant to s. 7, where an amendment to the plan is proposed after the creditors' meeting has been scheduled, the meeting may be adjourned on such term as to notice or otherwise as directed by the court, presumably to allow the creditors more time to consider the proposed amendment. Use of the term "adjourned" implies that the creditors' meeting has not yet been held or that the vote has not yet been taken as otherwise there would be nothing to adjourn.

[33] If the court is of the opinion that the proposed amendment does not adversely affect a particular class of creditors, the court has the discretion under s. 7 to direct that the meeting of that class need not be adjourned or a further meeting of that class need not be convened. Again, the reference to adjournment implies that the meeting of and voting by the creditors or class of creditors have not yet occurred, whereas use of the phrase "convene any further meeting" suggests that the meeting and vote of the creditors or particular class of creditors have taken place. It is not clear whether the provisions of s. 7 relating to proposed non-prejudicial amendments apply once the court has sanctioned the plan.

[34] Section 7 does not address whether the court can convene a further meeting of creditors to consider a proposed substantive amendment once the creditors' meeting and vote have taken place. Further, the section is silent as to whether the court can convene a further meeting of the creditors to consider such a proposal once the plan has received court sanction - the issue which arises on this application.

[35] A review of case law relating to amendments made under s. 7 is instructive as to the nature and timing of permissible court intervention after the creditors' vote has taken place.

[36] Section 7 has been interpreted as allowing substantive (i.e prejudicial) amendments only at the pre-vote stage. In ***Re Central Guaranty Trustco Ltd.*** (1993), 21 C.B.R. (3d) 139 (Ont. Ct. Just. (Gen. Div.)), Farley J. commented (at para. 11):

> ... In ***Algoma Steel Corp. v. Royal Bank of Canada*** (1992), 8 O.R. (3d) 449, the Court of Appeal determined that there were exceptional circumstances (unrelated to the Plan) which allowed it to adjust a Plan where no interest was adversely affected. The same cannot be said here. FSTQ aside from s. 11(c) of the *CCAA* also raised s. 7. I am of the view that s. 7 allows an amendment after an adjournment -- but not after a vote has been taken.

[37] Section 7 also has been interpreted as permitting judicial amendments of a technical non-prejudicial nature at the sanction stage (***Re Wandlyn Inns Ltd.*** (1992), 15 C.B.R. (3d) 316 (N.B.Q.B.)). Even then, the court's jurisdiction to allow a judicial amendment must be exercised sparingly, in exceptional circumstances, and only if permitted by the *CCAA* (***Algoma Steel Corp. v. Royal Bank*** (1992), 11 C.B.R. (3d) 11 at 15 (Ont. C.A.); ***Re Sammi Atlas Inc.*** (1998), 3 C.B.R. (4th) 171 (Ont. Ct Just. (Gen. Div.)) at para. 6). The court's jurisdiction does not extend

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to modifying plans of arrangement simply because a person is dissatisfied with the existing plan (***Re Daon Development Corp.*** (1984), 10 D.L.R. (4th) 216 at para. 9 (B.C.S.C.).

[38] In Houlden and Morawetz's *Bankruptcy and Insolvency Law of Canada*, 4th ed., vol. 4 (Toronto: Carswell, 2009) at p. 11-69, N§48, the authors observe that: "[a]lthough it would seem that once the plan has been sanctioned by the court, the court has no power to make any alterations or modifications in it, there are cases where orders have been made altering or modifying a plan after it has been sanctioned." They then cite a number of authorities, including those discussed below.

[39] In ***Re Northland Properties Ltd.*** (1989), 74 C.B.R. (N.S.) 231 (B.C.S.C.), a *CCAA* debtor successfully applied five months after the sanction order to rectify a unilateral mistake made by it in electing a mortgage rate under the plan of arrangement. The court focussed its analysis on whether this type of unilateral mistake was subject to rectification. In any event, the circumstances in that case are distinguishable from the situation here of a default at the implementation stage of *CCAA* proceedings.

[40] ***Re Royal Heaters Ltd.*** (1950), 30 C.B.R. 199 (Que. Sup .Ct.) concerned a series of post-sanction applications by a *CCAA* debtor for orders extending the time to make payments and temporarily suspending payments under the plan of arrangement. The debtor in that case, like the Debtors here, claimed that economic conditions had impaired its ability to honour its obligations under the plan. While the amendments clearly were prejudicial, the majority of the creditors in number and value consented to at least one of the extensions. Without discussing its jurisdiction to approve the amendments, the court granted the extensions, observing that it was in the interest of the creditors to do so.

[41] In ***Re Keddy Motor Inns Ltd.*** (1992), 13 C.B.R. (3d) 262, 113 N.S.R. (2d) 431 (S.C.T.D.), a sanctioned plan of arrangement specified certain payment dates that could not be complied with because of an extant appeal. Without reference to ss. 7 or 11, the court approved a change in those dates.

[42] In ***Algoma Steel Corp. v. Royal Bank of Canada*** (1992), 8 O.R. (3d) 449, leave to appeal to S.C.C. refused 10 O.R. (3d) xv, the Ontario Court of Appeal considered whether the existence of a sanctioned plan of arrangement under the *CCAA* prevented the court from permitting the applicant to sue the debtor to the limited extent of certain insurance proceeds. The court determined that the power to amend the plan in the manner sought could be found, by inference, in what is now s. 11.02 (the stay provision) of the *CCAA*. It was argued in that case that having regard to the commercial realities reflected by the *CCAA*, the power to allow an action to proceed could only be exercised before the creditors' vote. The court held that, as a matter of principle, there was no reason to suggest the court's power was limited in that way, although given "the primacy accorded by the Act to agreement among the affected actors, the jurisdiction of the court is to be exercised sparingly and in exceptional circumstances only, if the result of the exercise is to amend the plan, even in merely a technical way." It commented that it would be an unacceptable exercise of jurisdiction if the effect of granting the applicant leave to sue the debtor

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would be to make any assets other than the insurance proceeds vulnerable to possible execution. It noted that the proposed amendment to the plan was insignificant and technical only as far as the other creditors were concerned.

[43] The applicant creditor in ***Ontario v. Canadian Airlines Corp.***, 2001 ABQB 983, 306 A.R. 124 sought a declaration that the portion of the debt owed to it which was secured by letters of credit was not compromised by the plan of arrangement which had received court sanction. In the alternative, it asked for an order varying the plan to permit the liability secured by the letters of credit to be considered a secured claim and directing that the debtor was liable for the full amount of that liability up to the value of the letters of credit. The court dealt with the issue as one of interpretation and application of the plan, rather than its amendment.

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[44] However, in *obiter dicta*, Madam Justice Romaine expressed the view (at para. 61) that the court retains jurisdiction at the post-sanction stage to direct amendment to the plan, reasoning that:

> The *CCAA* authorizes the court to amend a plan in appropriate circumstances, where there are compelling reasons to do so. Although the Act does not expressly state that such amendment could take place after the Plan is sanctioned, as pointed out in ***Algoma***, *supra* there is no reason to suggest that the *CCAA* "contemplates a role for the court as a mere rubber stamp or one that is simply administrative rather than judicial" (p.103). While the circumstances justifying an amendment after a sanction hearing ought to be truly exceptional, in recognition of the potential violence done to the laudable goal of commercial certainty, there is no reason why subsequent amendments should be conclusively foreclosed in every case, without examination of the particular circumstances.

[45] Romaine J. commented at para. 56 that ss. 6 and 7 offer no guidance on whether a court-sanctioned plan may subsequently be amended. However, at para. 57, she noted:

> As mentioned, the *CCAA* confers broad discretion on the court and is to be afforded a large and liberal interpretation: ***Re Canadian Airlines Corp.***, *supra* at para 95 (Q.B); ***Chef Ready Foods Ltd. v. Hongkong Bank of Canada*** (1990), 51 B.C.L.R. (2d) 84 (C.A.). It is silent, however, on many procedural issues. Given the lack of legislative guidance, the courts have used the basic purpose of the *CCAA* as a guide to its application and the exercise of its discretion in disposing of applications under the Act: ***Re Canadian Airlines Corp.***, *supra* at para. 95. The keynote concepts of fairness and reasonableness have been recognized as the driving force behind the *CCAA* and the court's interpretation and application of the Act: ***Re Canadian Airlines Corp.*** at para. 95, ***Olympia & York Developments Ltd. v. Royal Trust Co.***, *supra* at p. 9.

[46] In concluding that amendment of the plan would recognize the concepts of fairness and reasonableness to a greater extent than would interpreting the plan in the manner advocated by

the debtor, Romaine J. took into consideration that the claims procedure in that case had been unique in that it allowed the debtor to unilaterally categorize its creditors and required that any creditor which did not agree with the classification file a dispute note. She also considered that the applicant creditor had not become aware that the debtor was rejecting its claim as being out of time until the last day and that no evidence of the creditor's position was presented to the court at the sanction hearing. In addition, she noted that no creditor or debtor prejudice would result from the sought after amendment.

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[47] As the proposed amendment in ***Ontario*** was non-prejudicial to the debtor and creditors, the court's jurisdiction to make the amendment might have been based on s. 7 or the court's plenary jurisdiction as set out in s. 11.

[48] Madam Justice Romaine again was asked to consider amending a plan of arrangement at the post-sanction stage in ***Teragol Investments Ltd. v. Hurricane Hydrocarbons Ltd.*** 2005 ABQB 324, 382 A.R. 383. In refusing the application, she commented (at para. 21) that a post-sanction amendment should be limited to truly exceptional circumstances as such an amendment has the potential to do violence t`o the goal of commercial certainty.

[49] In ***Century Services Inc.***, the first case in which the Supreme Court of Canada was asked to directly interpret the provisions of the *CCAA*, Deschamps J., for the majority, discussed the source of the court's authority during *CCAA* proceedings and the boundary between the court's statutory authority under the Act and the residual authority under its inherent and equitable jurisdiction when supervising a reorganization. She noted that appellate courts were of the view that while lower courts might be purporting to rely on their inherent jurisdiction, in fact they were simply construing the authority supplied by the *CCAA* itself, citing ***Re Skeena Cellulose Inc.***, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 at paras. 45-47 and ***Re Stelco Inc.*** (2005), 75 O.R. (3d) 5 at paras. 31-33 (C.A.). She affirmed that the appropriate approach for a court to take is to rely first on a purposive and liberal interpretation of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding. She accepted (at para. 66) that in most cases the issuance of an order in a *CCAA* proceeding should be considered to be an exercise in statutory interpretation, given the expansive interpretation the language of the statute is capable of supporting. The example she referred to was s. 11 of the *CCAA*, which was amended to make explicit the discretionary authority of the court under the *CCAA* and to endorse the broad reading of *CCAA* authority developed by the jurisprudence.

[50] Deschamps J. instructed (at paras. 69 and 70) that while the *CCAA* explicitly provides for certain orders, the general language of the Act should not be read as being restricted by the availability of more specific orders. She indicated that the court should take into consideration appropriateness, good faith, and due diligence when exercising *CCAA* authority, explaining that:

> Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of

an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[51] Given a plain and contextual reading of the *CCAA*, augmented by guidance provided by the case law, I conclude that:

(a) The courts' supervisory function ends only when the plan has been fully implemented or has failed. Parliament must have intended that the court retain jurisdiction to address issues that could arise during implementation of the plan, including whether to summon a further creditors' meeting after the creditors' vote or court sanction. Section 7 does not grant that jurisdiction. However, the court's discretionary authority under s. 11 is broad enough to encompass such a direction.

(b) In accordance with ***Century Services Inc.***, the court's general discretionary authority under s. 11 should not be interpreted as being restricted by the more specific authority set out in s. 7.

(c) When exercising its authority under s. 11, the court must consider the good faith of the applicant, whether due diligence has been exercised and the appropriateness of making the order sought. In regard to the latter, the court should consider whether the relief sought advances the objectives of the *CCAA* and all relevant policy concerns.

(d) Parliament's intention could not have been to introduce uncertainty and instability to the process. On the contrary, stability, certainty and fairness for all are the recognized goals of the *CCAA*. The effect of the sanction order is relevant as it binds the parties and cements commercial certainty. Once sanctioned, creditors can take their contract with the debtor "to the bank" (for all that may be worth where, as in the present case, plan implementation is staged). In balancing the policy objectives of the *CCAA*, Parliament must have intended that while calling a further meeting of the creditors should remain an option, under certain circumstances, at any stage of the proceedings, once the creditors have voted and the plan has been sanctioned, the court should do so only in exceptional circumstances - circumstances well beyond foreseeable risks such as ordinary business risks.

(e) While each case must be determined on its unique facts, at a minimum, the court should consider the following non-exhaustive list of considerations (many of which overlap and all of which rest on the applicant to establish)

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before summoning a further meeting of the creditors at the post-sanction stage to vote on a proposed amendment to the plan:

(i) Is the plea for relief made in good faith?

(ii) Has it been made in a timely fashion?

(iii) Would granting the relief advance the policy objectives underlying the *CCAA*?

(iv) Would granting the relief enhance the public's confidence in the *CCAA* process?

(v) Would granting the relief otherwise serve the ends of justice?

(vi) What is the level of creditor support?

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VI. Application to the Present Case

A. Is the Plea for Relief Made in Good Faith?

[52] There was a lack of cogent evidence establishing that the Debtors have no hope of meeting their obligations under the Plan unless the creditors' meeting is allowed and the proposed amendment is passed.

[53] It appears that the Debtors banked on a steady flow of work and the payment of certain receivables to fund the second installment due under the Plan. Neither transpired. However, since the fall of 2010, Kerr has experienced an increase in its work. It is unclear whether Composite is back in business today.

[54] Mr. Weibe indicated that he is "cautiously optimistic" about the Debtors' future and, as evidenced by his answers given during cross-examination on his affidavit, the Debtors want matters with their pre-*CCAA* creditors to end; they want to get it "out of [their] hair." Doubtless, this is a common sentiment for any company in the process of restructuring.

[55] While I accept that the Debtors have suffered some negative effects from a downturn in the economy, nevertheless I find it curious, and indeed troubling, that:

(i) since formulating the Plan their workforce has more than quadrupled;

(ii) they chose to rely (at least in part) on the impact of 1005559's debts to support their plea for relief;

(iii) the evidence fails to show that they have taken all reasonable steps to fund the Plan, including downsizing and selling non-essential assets.

[56] In the result, despite the Monitor's comment (as stated in its fifth report to the court) that it is "... unaware of any facts to suggest that the Management of the Companies are not acting in good faith with respect to their creditors...", I am not so certain. In this regard, I am mindful that the Monitor's comment preceded the cross-examination on affidavit of Mr. Weibe that fleshed out much of the evidence that I have referred to in relation to this factor.

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B. Is the Application Timely?

[57] There is no suggestion that the Debtors delayed in bringing this application. The real concern is whether it is premature.

C. Would Granting the Relief Advance the Policy Objectives Underlying the *CCAA*?

[58] The facts of this case reveal a tension between the objectives of facilitating restructuring and providing stability, certainty and fairness for all of the stakeholders. Avoiding a second, costly insolvency proceeding by allowing the Debtors to present a revised compromise, proposal, or plan of arrangement is a laudable goal. However, this would involve a tradeoff. The creditors voted on the Plan. Their agreement was cemented by the Sanction Order. They were entitled to rely on the deal and may have altered their own circumstances as a result of it. The Plan amendment proposed by the Debtors would see an eighty percent reduction in the amount the creditors originally accepted. So radical is this proposed change that it is more reasonably viewed as a completely new deal rather than an amendment.

[59] While granting the relief would permit the creditors the opportunity to say whether the Debtors' proposed new deal is acceptable, other considerations also must be weighed. A non-exhaustive list of those considerations includes:

(i) the creditors' right to receive current financial information prepared in accordance with the requirements of s. 10(2);

(ii) meaningful compliance with the Monitor's duty to review the Debtors' s. 10(2) financial information as to its reasonableness (s.23(1)(b));

(iii) meaningful compliance with the Monitor's duty to report to the court about the fairness and reasonableness of the proposal (s. 23(1)(i));

(vi) the court's consideration of whether the proposal is workable (see ***Royal Bank of Canada v. Fracmaster Ltd.***, 1999 ABCA 178, 244 A.R. 93, confirming 1999 ABQB 425, 245 A.R. 138 in relation to a ss. 4 or 5 application).

These deficiencies might well be addressed by imposing conditions, but the benefit of that approach should be assessed contextually.

[60] The demise of the Debtors is not a certainty if the relief is not granted. They can attempt to make another deal with their creditors in alternate insolvency proceedings, whether under the *BIA* or possibly another filing under the *CCAA*. As noted in L.W. Houlden and G.B. Morawetz's *Bankruptcy and Insolvency Law of Canada* (Toronto: Carswell, 2009), 4th ed. (rev'd), vol. 4, p. 11-28, there is nothing in the statute barring a second application. While the court in ***Re Norseman Products Ltd.*** (1949), 30 C.B.R. 71, [1950] O.W.N. 81 commented that a debtor company cannot claim the benefit of the *CCAA* more than once as this would lead to abuse, relying on ***Re Le Comptoir Cooperatif du Combustible Lteé*** (1935), 17 C.B.R. 124 (Que. S.C.), restructuring cases such as ***Algoma Steel*** suggest that a subsequent filing is appropriate where the statute affords an opportunity for a company to attempt to devise a revised business plan to address its financial distress. Such proceedings come at a price, but given the Debtors' work on its propose revised deal to date and the cost of complying with conditions to address informational concerns , that price is likely less than might otherwise be incurred.

[61] In the result, the Debtors have not shown that the policy objectives underlying the *CCAA* would be advanced or that the process would be served by granting them the opportunity to present their proposal to their creditors.

D. Would Granting the Relief Enhance the Public's Confidence in the *CCAA* Process?

[62] The Debtors have experienced economic trouble which has been caused, at least in part, by a downturn in the condominium development industry. However, downturns in the condominium market, especially in the boom and bust economy of Alberta, are a foreseeable and ordinary business risk. There has been insufficient evidence presented establishing that this downturn is truly exceptional or was unforeseeable.

[63] Similarly, the impact of the Debtors' secured obligations is not a basis for finding exceptional circumstances. These obligations were known long ago when the Plan was formulated. Although 1005559 is not a part of the group which sought *CCAA* protection, it is a related entity and its performance influences that of the Debtors. Alone or in combination with the Debtors' secured obligations, the obligations of 1005559 do not constitute an extraordinary circumstance.

[64] The public's confidence in the *CCAA* process is necessarily grounded in fairness and stability for all of the stakeholders. Allowing the Debtors an opportunity for what, essentially, would be a second kick at the *CCAA* can after defaulting on their obligations would not, in all of the circumstances, further this objective.

E. Would Granting the Relief Serve the Ends of Justice?

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[65] Assessing whether the relief sought would serve the ends of justice entails many of the same considerations as determining whether it would advance the policy objectives underlying the *CCAA*. In addition, factors such as whether a unilateral mistake has been made may be taken into account, as in ***Re Northland Properties Ltd.***

[66] In the present case, directing a further meeting of the creditors is not necessary to meet the ends of justice.

F. What is the Level of Creditor Support?

[67] The Opposing Creditors oppose granting of the application. There is no evidence of the level of creditor support to the proposed amendment. However, I understand that the creditors were canvassed informally, an approach which presumably failed.

[68] After weighing the various factors, I find that the Debtors have failed to meet the high threshold required of them on this application.

VII. Conclusion

[69] The Debtors are in default of their obligations under the Plan. Claiming that a downturn in the economy, the weight of secured debt and the obligations of a related party preclude them from living up to their obligations, they want another chance to escape bankruptcy by presenting their creditors with a proposed amendment to the Plan. The proposed amendment is to reduce the Debtors' obligation under the Plan by eighty percent. In essence, it is a new deal.

[70] A purposive and contextual interpretation of s. 11 of the *CCAA* vests the court with discretion to grant the relief sought. However, the threshold for summoning a further meeting of creditors after court sanction is high and to succeed the debtor must establish truly extraordinary circumstances.

[71] In making its determination, the court should consider whether the debtor's application is made in good faith and whether granting the relief would advance the policy objectives of the *CCAA*, serve and enhance the public's confidence in the process or otherwise serve the ends of justice. The court should also consider the degree of creditor support for the application.

[72] The Debtors in the present case have not met the high threshold required for the court to exercise its discretion to order a further meeting of the creditors to be called at this late juncture. Accordingly, the application is dismissed and the creditors are at liberty to apply to lift the stay and pursue their remedies. The parties may speak to me within 30 days if they are unable to agree on costs.

Dated at the City of Edmonton, Alberta this 30th day of March, 2011.

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J.E. Topolniski
J.C.Q.B.A.

Appearances:

Darren Bieganek
for the Applicant

James Hanley
for the Respondent

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Tab B

Century Services Inc. *Appellant*

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada *Respondent*

INDEXED AS: CENTURY SERVICES INC. *v.* CANADA (ATTORNEY GENERAL)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. *Appelante*

c.

Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

RÉPERTORIÉ : CENTURY SERVICES INC. *c.* CANADA (PROCUREUR GÉNÉRAL)

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

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The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« *LTA* ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« *LFI* »). Toutefois, le par. 18.3(1) de la *LACC* prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la *LACC* a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la *LFI*. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la *LTA*, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la *LACC* ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la *LACC*, de la fonction de cette loi parmi

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Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à

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recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

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No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

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Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44*f*) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Mary I. A. Buttery, *Owen J. James* and *Matthew J. G. Curtis*, for the appellant.

Gordon Bourgard, *David Jacyk* and *Michael J. Lema*, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

[1] DESCHAMPS J. — For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency*

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

Mary I. A. Buttery, *Owen J. James* et *Matthew J. G. Curtis*, pour l'appelante.

Gordon Bourgard, *David Jacyk* et *Michael J. Lema*, pour l'intimé.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] LA JUGE DESCHAMPS — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la *LACC* et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la *LACC*, et non la *LTA*, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la *LACC* et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

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Act, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

[2] Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

[3] Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

discrétionnaire de lever partiellement la suspension des procédures pour permettre au débiteur de faire cession de ses biens en vertu de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). Je suis d'avis d'accueillir le pourvoi.

1. Faits et décisions des juridictions inférieures

[2] Le 13 décembre 2007, Ted LeRoy Trucking Ltd. (« LeRoy Trucking ») a déposé une requête sous le régime de la *LACC* devant la Cour suprême de la Colombie-Britannique et obtenu la suspension des procédures dans le but de réorganiser ses finances. L'entreprise a vendu certains éléments d'actif excédentaires, comme l'y autorisait l'ordonnance.

[3] Parmi les dettes de LeRoy Trucking figurait une somme perçue par celle-ci au titre de la taxe sur les produits et services (« TPS ») mais non versée à la Couronne. La *LTA* crée en faveur de la Couronne une fiducie réputée visant les sommes perçues au titre de la TPS. Cette fiducie réputée s'applique à tout bien ou toute recette détenue par la personne qui perçoit la TPS et à tout bien de cette personne détenu par un créancier garanti, et le produit découlant de ces biens doit être payé à la Couronne par priorité sur tout droit en garantie. Aux termes de la *LTA*, la fiducie réputée s'applique malgré tout autre texte législatif du Canada sauf la *LFI*. Cependant, la *LACC* prévoit également que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, ne s'appliquent pas sous son régime les fiducies réputées qui existent en faveur de la Couronne. Par conséquent, pour ce qui est de la TPS, la Couronne est un créancier non garanti dans le cadre de cette loi. Néanmoins, à l'époque où LeRoy Trucking a débuté ses procédures en vertu de la *LACC*, la jurisprudence dominante indiquait que la *LTA* l'emportait sur la *LACC*, la Couronne jouissant ainsi d'un droit prioritaire à l'égard des créances relatives à la TPS dans le cadre de la *LACC*, malgré le fait qu'elle aurait perdu cette priorité en vertu de la *LFI*. La *LACC* a fait l'objet de modifications substantielles en 2005, et certaines des dispositions en cause dans le présent pourvoi ont alors été renumérotées et reformulées (L.C. 2005, ch. 47). Mais ces modifications ne sont entrées en vigueur que le 18 septembre 2009. Je ne me reporterai aux dispositions modifiées que lorsqu'il sera utile de le faire.

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[4] On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

[5] On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

[7] First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and

[4] Le 29 avril 2008, le juge en chef Brenner de la Cour suprême de la Colombie-Britannique, dans le contexte des procédures intentées en vertu de la *LACC*, a approuvé le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars, soit le produit de la vente d'éléments d'actif excédentaires. LeRoy Trucking a proposé de retenir un montant égal aux sommes perçues au titre de la TPS mais non versées à la Couronne et de le déposer dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Afin de maintenir le statu quo, en raison du succès incertain de la réorganisation, le juge en chef Brenner a accepté la proposition et ordonné qu'une somme de 305 202,30 $ soit détenue par le contrôleur dans son compte en fiducie.

[5] Le 3 septembre 2008, ayant conclu que la réorganisation n'était pas possible, LeRoy Trucking a demandé à la Cour suprême de la Colombie-Britannique l'autorisation de faire cession de ses biens en vertu de la *LFI*. Pour sa part, la Couronne a demandé au tribunal d'ordonner le paiement au receveur général du Canada de la somme détenue par le contrôleur au titre de la TPS. Le juge en chef Brenner a rejeté cette dernière demande. Selon lui, comme la détention des fonds dans le compte en fiducie du contrôleur visait à [TRADUCTION] « faciliter le paiement final des sommes de TPS qui étaient dues avant que l'entreprise ne débute les procédures, mais seulement si un plan viable était proposé », l'impossibilité de procéder à une telle réorganisation, suivie d'une cession de biens, signifiait que la Couronne perdrait sa priorité sous le régime de la *LFI* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] La Cour d'appel de la Colombie-Britannique a accueilli l'appel interjeté par la Couronne (2009 BCCA 205, 270 B.C.A.C. 167). Rédigeant l'arrêt unanime de la cour, le juge Tysoe a invoqué deux raisons distinctes pour y faire droit.

[7] Premièrement, le juge d'appel Tysoe a conclu que le pouvoir conféré au tribunal par l'art. 11 de la *LACC* n'autorisait pas ce dernier à rejeter la demande de la Couronne sollicitant le paiement immédiat des sommes de TPS faisant l'objet de la fiducie réputée,

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that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

[8] Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

[9] This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

après qu'il fut devenu clair que la tentative de réorganisation avait échoué et que la faillite était inévitable. Comme la restructuration n'était plus une possibilité, il ne servait plus à rien, dans le cadre de la *LACC*, de suspendre le paiement à la Couronne des sommes de TPS et le tribunal était tenu, en raison de la priorité établie par la *LTA*, d'en autoriser le versement à la Couronne. Ce faisant, le juge Tysoe a adopté le raisonnement énoncé dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), suivant lequel la fiducie réputée que crée la *LTA* à l'égard des sommes dues au titre de la TPS établissait la priorité de la Couronne sur les créanciers garantis dans le cadre de la *LACC*.

[8] Deuxièmement, le juge Tysoe a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur le 29 avril 2008, le tribunal avait créé une fiducie expresse en faveur de la Couronne, et que les sommes visées ne pouvaient être utilisées à quelque autre fin que ce soit. En conséquence, la Cour d'appel a ordonné que les sommes détenues par le contrôleur en fiducie pour la Couronne soient versées au receveur général.

2. Questions en litige

[9] Le pourvoi soulève trois grandes questions que j'examinerai à tour de rôle :

(1) Le paragraphe 222(3) de la *LTA* l'emporte-t-il sur le par. 18.3(1) de la *LACC* et donne-t-il priorité à la fiducie réputée qui est établie par la *LTA* en faveur de la Couronne pendant des procédures régies par la *LACC*, comme il a été décidé dans l'arrêt *Ottawa Senators*?

(2) Le tribunal a-t-il outrepassé les pouvoirs qui lui étaient conférés par la *LACC* en levant la suspension des procédures dans le but de permettre au débiteur de faire cession de ses biens?

(3) L'ordonnance du tribunal datée du 29 avril 2008 exigeant que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte en fiducie du contrôleur a-t-elle créé une fiducie expresse en faveur de la Couronne à l'égard des fonds en question?

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3. Analysis

[10] The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite . . . any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

[11] In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain

3. Analyse

[10] La première question porte sur les priorités de la Couronne dans le contexte de l'insolvabilité. Comme nous le verrons, la *LTA* crée en faveur de la Couronne une fiducie réputée à l'égard de la TPS due par un débiteur « [m]algré [. . .] tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) » (par. 222(3)), alors que selon la disposition de la *LACC* en vigueur à l'époque, « par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme [tel] » (par. 18.3(1)). Il est difficile d'imaginer deux dispositions législatives plus contradictoires en apparence. Cependant, comme c'est souvent le cas, le conflit apparent peut être résolu au moyen des principes d'interprétation législative.

[11] Pour interpréter correctement ces dispositions, il faut examiner l'historique de la *LACC*, la fonction de cette loi parmi l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et les principes reconnus dans la jurisprudence. Nous verrons que les priorités de la Couronne en matière d'insolvabilité ont été restreintes de façon appréciable. La réponse à la deuxième question repose aussi sur le contexte de la *LACC*, mais l'objectif de cette loi et l'interprétation qu'en a donnée la jurisprudence jouent également un rôle essentiel. Après avoir examiné les deux premières questions soulevées en l'espèce, j'aborderai la conclusion du juge Tysoe selon laquelle l'ordonnance rendue par le tribunal le 29 avril 2008 a eu pour effet de créer une fiducie expresse en faveur de la Couronne.

3.1 *Objectif et portée du droit relatif à l'insolvabilité*

[12] L'insolvabilité est la situation de fait qui se présente quand un débiteur n'est pas en mesure de payer ses créanciers (voir, généralement, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 16). Certaines procédures judiciaires peuvent être intentées en cas d'insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire

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a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

[13] Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

[14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either

ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de liquidation.

[13] Le droit canadien en matière d'insolvabilité commerciale n'est pas codifié dans une seule loi exhaustive. En effet, le législateur a plutôt adopté plusieurs lois sur l'insolvabilité, la principale étant la *LFI*. Cette dernière établit un régime juridique autonome qui concerne à la fois la réorganisation et la liquidation. Bien qu'il existe depuis longtemps des mesures législatives relatives à la faillite, la *LFI* elle-même est une loi assez récente — elle a été adoptée en 1992. Ses procédures se caractérisent par une approche fondée sur des règles préétablies. Les débiteurs insolvables — personnes physiques ou personnes morales — qui doivent 1 000 $ ou plus peuvent recourir à la *LFI*. Celle-ci comporte des mécanismes permettant au débiteur de présenter à ses créanciers une proposition de rajustement des dettes. Si la proposition est rejetée, la *LFI* établit la démarche aboutissant à la faillite : les biens du débiteur sont liquidés et le produit de cette liquidation est versé aux créanciers conformément à la répartition prévue par la loi.

[14] La possibilité de recourir à la *LACC* est plus restreinte. Le débiteur doit être une compagnie dont les dettes dépassent cinq millions de dollars. Contrairement à la *LFI*, la *LACC* ne contient aucune disposition relative à la liquidation de l'actif d'un débiteur en cas d'échec de la réorganisation. Une procédure engagée sous le régime de la *LACC* peut se terminer de trois façons différentes. Le scénario idéal survient dans les cas où la suspension des recours donne au débiteur un répit lui permettant de rétablir sa solvabilité et où le processus régi par la *LACC* prend fin sans qu'une réorganisation soit nécessaire. Le deuxième scénario le plus souhaitable est le cas où la transaction ou l'arrangement proposé par le débiteur est

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the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

[15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[16] Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors*

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

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Arrangement Act, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

[17] Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

[18] Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

[19] The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make

aboutissait presque invariablement à la liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] R.C.S. 659, p. 660-661; Sarra, *Creditor Rights*, p. 12-13).

[17] Le législateur comprenait, lorsqu'il a adopté la *LACC*, que la liquidation d'une compagnie insolvable causait préjudice à la plupart des personnes touchées — notamment les créanciers et les employés — et que la meilleure solution consistait dans un arrangement permettant à la compagnie de survivre (Sarra, *Creditor Rights*, p. 13-15).

[18] Les premières analyses et décisions judiciaires à cet égard ont également entériné les objectifs réparateurs de la *LACC*. On y reconnaissait que la valeur de la compagnie demeurait plus grande lorsque celle-ci pouvait poursuivre ses activités, tout en soulignant les pertes intangibles découlant d'une liquidation, par exemple la disparition de la clientèle (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 592). La réorganisation sert l'intérêt public en permettant la survie de compagnies qui fournissent des biens ou des services essentiels à la santé de l'économie ou en préservant un grand nombre d'emplois (*ibid.*, p. 593). Les effets de l'insolvabilité pouvaient même toucher d'autres intéressés que les seuls créanciers et employés. Ces arguments se font entendre encore aujourd'hui sous une forme un peu différente, lorsqu'on justifie la réorganisation par la nécessité de remettre sur pied des compagnies qui constituent des volets essentiels d'un réseau complexe de rapports économiques interdépendants, dans le but d'éviter les effets négatifs de la liquidation.

[19] La *LACC* est tombée en désuétude au cours des décennies qui ont suivi, vraisemblablement parce que des modifications apportées en 1953 ont restreint son application aux compagnies émettant des obligations (S.C. 1952-53, ch. 3). Pendant la récession du début des années 1980, obligés de s'adapter au nombre grandissant d'entreprises en difficulté, les avocats travaillant dans le domaine de l'insolvabilité ainsi que les tribunaux ont redécouvert cette loi et s'en sont servis pour relever les nouveaux défis de l'économie. Les participants aux

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the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

[20] Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

[21] In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a

procédures en sont peu à peu venus à reconnaître et à apprécier la caractéristique propre de la loi : l'attribution, au tribunal chargé de surveiller le processus, d'une grande latitude lui permettant de rendre les ordonnances nécessaires pour faciliter la réorganisation du débiteur et réaliser les objectifs de la *LACC*. Nous verrons plus loin comment les tribunaux ont utilisé de façon de plus en plus souple et créative les pouvoirs qui leur sont conférés par la *LACC*.

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvables ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la *LACC* dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la *LFI* a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la *LFI* supplanterait rapidement la *LACC*, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule nº 15, 3e sess., 34e lég., 3 octobre 1991, 15:15-15:16).

[21] En rétrospective, cette conclusion du comité de la Chambre des communes ne correspondait pas à la réalité. Elle ne tenait pas compte de la nouvelle vitalité de la *LACC* dans la pratique contemporaine,

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flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

[22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing,

ni des avantages qu'offrait, en présence de réorganisations de plus en plus complexes, un processus souple de réorganisation sous surveillance judiciaire par rapport au régime plus rigide de la *LFI*, fondé sur des règles préétablies. La « souplesse de la LACC [était considérée comme offrant] de grands avantages car elle permet de prendre des décisions créatives et efficaces » (Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2002), p. 50). Au cours des trois dernières décennies, la résurrection de la *LACC* a donc été le moteur d'un processus grâce auquel, selon un auteur, [TRADUCTION] « le régime juridique canadien de restructuration en cas d'insolvabilité — qui était au départ un instrument plutôt rudimentaire — a évolué pour devenir un des systèmes les plus sophistiqués du monde développé » (R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 481).

[22] Si les instances en matière d'insolvabilité peuvent être régies par des régimes législatifs différents, elles n'en présentent pas moins certains points communs, dont le plus frappant réside dans le modèle de la procédure unique. Le professeur Wood a décrit ainsi la nature et l'objectif de ce modèle dans *Bankruptcy and Insolvency Law* :

> [TRADUCTION] Elles prévoient toutes une procédure collective qui remplace la procédure civile habituelle dont peuvent se prévaloir les créanciers pour faire valoir leurs droits. Les recours des créanciers sont collectivisés afin d'éviter l'anarchie qui régnerait si ceux-ci pouvaient exercer leurs recours individuellement. En l'absence d'un processus collectif, chaque créancier sait que faute d'agir de façon rapide et déterminée pour saisir les biens du débiteur, il sera devancé par les autres créanciers. [p. 2-3]

Le modèle de la procédure unique vise à faire échec à l'inefficacité et au chaos qui résulteraient de l'insolvabilité si chaque créancier engageait sa propre procédure dans le but de recouvrer sa créance. La réunion — en une seule instance relevant d'un même tribunal — de toutes les actions possibles contre le débiteur a pour effet de faciliter la négociation avec

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rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

[23] Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

[24] With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

[25] Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

les créanciers en les mettant tous sur le même pied. Cela évite le risque de voir un créancier plus combatif obtenir le paiement de ses créances sur l'actif limité du débiteur pendant que les autres créanciers tentent d'arriver à une transaction. La *LACC* et la *LFI* autorisent toutes deux pour cette raison le tribunal à ordonner la suspension de toutes les actions intentées contre le débiteur pendant qu'on cherche à conclure une transaction.

[23] Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. De plus, l'une des caractéristiques importantes de la réforme dont ces deux lois ont fait l'objet depuis 1992 est la réduction des priorités de la Couronne (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73 et 125; L.C. 2000, ch. 30, art. 148; L.C. 2005, ch. 47, art. 69 et 131; L.C. 2009, ch. 33, art. 25; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*).

[24] Comme les régimes de restructuration parallèles de la *LACC* et de la *LFI* constituent désormais une caractéristique reconnue dans le domaine du droit de l'insolvabilité, le travail de réforme législative contemporain a principalement visé à harmoniser, dans la mesure du possible, les aspects communs aux deux régimes et à privilégier la réorganisation plutôt que la liquidation (voir la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta L.R. (4th) 192, par. 19).

[25] Ayant à l'esprit le contexte historique de la *LACC* et de la *LFI*, je vais maintenant aborder la première question en litige.

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3.2 *GST Deemed Trust Under the CCAA*

[26] The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

[27] The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

[28] The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims

3.2 *Fiducie réputée se rapportant à la TPS dans le cadre de la LACC*

[26] La Cour d'appel a estimé que la *LTA* empêchait le tribunal de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS, lorsqu'il a partiellement levé la suspension des procédures engagées contre le débiteur afin de permettre à celui-ci de faire cession de ses biens. Ce faisant, la cour a adopté un raisonnement qui s'insère dans un courant jurisprudentiel dominé par l'arrêt *Ottawa Senators*, suivant lequel il demeure possible de demander le bénéfice d'une fiducie réputée établie par la *LTA* pendant une réorganisation opérée en vertu de la *LACC*, et ce, malgré les dispositions de la *LACC* qui semblent dire le contraire.

[27] S'appuyant largement sur l'arrêt *Ottawa Senators* de la Cour d'appel de l'Ontario, la Couronne plaide que la disposition postérieure de la *LTA* créant la fiducie réputée visant la TPS l'emporte sur la disposition de la *LACC* censée neutraliser la plupart des fiducies réputées qui sont créées par des dispositions législatives. Si la Cour d'appel a accepté ce raisonnement dans la présente affaire, les tribunaux provinciaux ne l'ont pas tous adopté (voir, p. ex., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), autorisation d'appel accordée, 2010 QCCA 183 (CanLII)). Dans ses observations écrites adressées à la Cour, Century Services s'est fondée sur l'argument suivant lequel le tribunal pouvait, en vertu de la *LACC*, maintenir la suspension de la demande de la Couronne visant le paiement de la TPS non versée. Au cours des plaidoiries, la question de savoir si l'arrêt *Ottawa Senators* était bien fondé a néanmoins été soulevée. Après l'audience, la Cour a demandé aux parties de présenter des observations écrites supplémentaires à ce sujet. Comme il ressort clairement des motifs de ma collègue la juge Abella, cette question a pris une grande importance devant notre Cour. Dans ces circonstances, la Cour doit statuer sur le bien-fondé du raisonnement adopté dans l'arrêt *Ottawa Senators*.

[28] Le contexte général dans lequel s'inscrit cette question concerne l'évolution considérable, signalée plus haut, de la priorité dont jouit la Couronne en tant que créancier en cas d'insolvabilité. Avant les

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largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

[29] Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

[30] Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §2).

[31] With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property

années 1990, les créances de la Couronne bénéficiaient dans une large mesure d'une priorité en cas d'insolvabilité. Cette situation avantageuse suscitait une grande controverse. Les propositions de réforme du droit de l'insolvabilité de 1970 et de 1986 en témoignent — elles recommandaient que les créances de la Couronne ne fassent l'objet d'aucun traitement préférentiel. Une question connexe se posait : celle de savoir si la Couronne était même assujettie à la *LACC*. Les modifications apportées à la *LACC* en 1997 ont confirmé qu'elle l'était bel et bien (voir *LACC*, art. 21, ajouté par L.C. 1997, ch. 12, art. 126).

[29] Les revendications de priorité par l'État en cas d'insolvabilité sont abordées de différentes façons selon les pays. Par exemple, en Allemagne et en Australie, l'État ne bénéficie d'aucune priorité, alors qu'aux États-Unis et en France il jouit au contraire d'une large priorité (voir B. K. Morgan, « Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy » (2000), 74 *Am. Bankr. L.J.* 461, p. 500). Le Canada a choisi une voie intermédiaire dans le cadre d'une réforme législative amorcée en 1992 : la Couronne a conservé sa priorité pour les sommes retenues à la source au titre de l'impôt sur le revenu et des cotisations à l'assurance-emploi (« AE ») et au Régime de pensions du Canada (« RPC »), mais elle est un créancier ordinaire non garanti pour la plupart des autres sommes qui lui sont dues.

[30] Le législateur a fréquemment adopté des mécanismes visant à protéger les créances de la Couronne et à permettre leur exécution. Les deux plus courants sont les fiducies présumées et les pouvoirs de saisie-arrêt (voir F. L. Lamer, *Priority of Crown Claims in Insolvency* (feuilles mobiles), §2).

[31] Pour ce qui est des sommes de TPS perçues, le législateur a établi une fiducie réputée. La *LTA* précise que la personne qui perçoit une somme au titre de la TPS est réputée la détenir en fiducie pour la Couronne (par. 222(1)). La fiducie réputée s'applique aux autres biens de la personne qui perçoit la taxe, pour une valeur égale à la somme réputée détenue en fiducie, si la somme en question n'a pas été versée en conformité avec la *LTA*. La fiducie réputée vise

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held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

[32] Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

[33] In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

également les biens détenus par un créancier garanti qui, si ce n'était de la sûreté, seraient les biens de la personne qui perçoit la taxe (par. 222(3)).

[32] Utilisant pratiquement les mêmes termes, le législateur a créé de semblables fiducies réputées à l'égard des retenues à la source relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC (voir par. 227(4) de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), par. 86(2) et (2.1) de la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23, et par. 23(3) et (4) du *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8). J'emploierai ci-après le terme « retenues à la source » pour désigner les retenues relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC.

[33] Dans *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411, la Cour était saisie d'un litige portant sur la priorité de rang entre, d'une part, une fiducie réputée établie en vertu de la *LIR* à l'égard des retenues à la source, et, d'autre part, des sûretés constituées en vertu de la *Loi sur les banques*, L.C. 1991, ch. 46, et de la loi de l'Alberta intitulée *Personal Property Security Act*, S.A. 1988, ch. P-4.05 (« *PPSA* »). D'après les dispositions alors en vigueur, une fiducie réputée — établie en vertu de la *LIR* à l'égard des biens du débiteur pour une valeur égale à la somme due au titre de l'impôt sur le revenu — commençait à s'appliquer au moment de la liquidation, de la mise sous séquestre ou de la cession de biens. Dans *Sparrow Electric*, la Cour a conclu que la fiducie réputée de la *LIR* ne pouvait pas l'emporter sur les sûretés, au motif que, comme celles-ci constituaient des privilèges fixes grevant les biens dès que le débiteur acquérait des droits sur eux, il n'existait pas de biens susceptibles d'être visés par la fiducie réputée de la *LIR* lorsqu'elle prenait naissance par la suite. Ultérieurement, dans *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720, la Cour a souligné que le législateur était intervenu pour renforcer la fiducie réputée de la *LIR* en précisant qu'elle est réputée s'appliquer dès le moment où les retenues ne sont pas versées à la Couronne conformément aux exigences de la *LIR*, et en donnant à la Couronne la priorité sur toute autre garantie (par. 27-29) (la « modification découlant de l'arrêt *Sparrow Electric* »).

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[34] The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

222. . . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed . . . .

[35] The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

[36] The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

[37] Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have,

[34] Selon le texte modifié du par. 227(4.1) de la *LIR* et celui des fiducies réputées correspondantes établies dans le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* à l'égard des retenues à la source, la fiducie réputée s'applique malgré tout autre texte législatif fédéral sauf les art. 81.1 et 81.2 de la *LFI*. La fiducie réputée de la *LTA* qui est en cause en l'espèce est formulée en des termes semblables sauf que la limite à son application vise la *LFI* dans son entier. Voici le texte de la disposition pertinente :

222. . . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés . . .

[35] La Couronne soutient que la modification découlant de l'arrêt *Sparrow Electric*, qui a été ajoutée à la *LTA* par le législateur en 2000, visait à maintenir la priorité de Sa Majesté sous le régime de la *LACC* à l'égard du montant de TPS perçu, tout en reléguant celle-ci au rang de créancier non garanti à l'égard de ce montant sous le régime de la *LFI* uniquement. De l'avis de la Couronne, il en est ainsi parce que, selon la *LTA*, la fiducie réputée visant la TPS demeure en vigueur « malgré » tout autre texte législatif sauf la *LFI*.

[36] Les termes utilisés dans la *LTA* pour établir la fiducie réputée à l'égard de la TPS créent un conflit apparent avec la *LACC*, laquelle précise que, sous réserve de certaines exceptions, les biens qui sont réputés selon un texte législatif être détenus en fiducie pour la Couronne ne doivent pas être considérés comme tels.

[37] Par une modification apportée à la *LACC* en 1997 (L.C. 1997, ch. 12, art. 125), le législateur

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subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[38] An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 . . .

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

semble, sous réserve d'exceptions spécifiques, avoir neutralisé les fiducies réputées créées en faveur de la Couronne lorsque des procédures de réorganisation sont engagées sous le régime de cette loi. La disposition pertinente, à l'époque le par. 18.3(1), était libellée ainsi :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

Cette neutralisation des fiducies réputées a été maintenue dans des modifications apportées à la *LACC* en 2005 (L.C. 2005, ch. 47), où le par. 18.3(1) a été reformulé et renuméroté, devenant le par. 37(1) :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

[38] La *LFI* comporte une disposition analogue, qui — sous réserve des mêmes exceptions spécifiques — neutralise les fiducies réputées établies en vertu d'un texte législatif et fait en sorte que les biens du failli qui autrement seraient visés par une telle fiducie font partie de l'actif du débiteur et sont à la disposition des créanciers (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73; *LFI*, par. 67(2)). Il convient de souligner que, tant dans la *LACC* que dans la *LFI*, les exceptions visent les retenues à la source (*LACC*, par. 18.3(2); *LFI*, par. 67(3)). Voici la disposition pertinente de la *LACC* :

18.3 . . .

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

Par conséquent, la fiducie réputée établie en faveur de la Couronne et la priorité dont celle-ci jouit de ce fait sur les retenues à la source continuent de s'appliquer autant pendant la réorganisation que pendant la faillite.

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[39] Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

18.4 . . .

(3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution . . . .

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

[40] The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize

[39] Par ailleurs, les autres créances de la Couronne sont considérées par la *LACC* et la *LFI* comme des créances non garanties (*LACC*, par. 18.4(1); *LFI*, par. 86(1)). Ces dispositions faisant de la Couronne un créancier non garanti comportent une exception expresse concernant les fiducies réputées établies par un texte législatif à l'égard des retenues à la source (*LACC*, par. 18.4(3); *LFI*, par. 86(3)). Voici la disposition de la *LACC* :

18.4 . . .

(3) Le paragraphe (1) [suivant lequel la Couronne a le rang de créancier non garanti] n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation . . .

Par conséquent, non seulement la *LACC* précise que les créances de la Couronne ne bénéficient pas d'une priorité par rapport à celles des autres créanciers (par. 18.3(1)), mais les exceptions à cette règle (maintien de la priorité de la Couronne dans le cas des retenues à la source) sont mentionnées à plusieurs reprises dans la Loi.

[40] Le conflit apparent qui existe dans la présente affaire fait qu'on doit se demander si la règle de la *LTA* adoptée en 2000, selon laquelle les fiducies réputées visant la TPS s'appliquent malgré tout autre texte législatif fédéral sauf la *LFI*, l'emporte sur la règle énoncée dans la *LACC* — qui a d'abord été édictée en 1997 à l'art. 18.3 — suivant laquelle, sous réserve de certaines exceptions explicites, les fiducies réputées établies par une disposition législative sont sans effet dans le cadre de la *LACC*. Avec égards pour l'opinion contraire exprimée par mon collègue le juge Fish, je ne crois pas qu'on puisse résoudre ce conflit apparent

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conflicts, apparent or real, and resolve them when possible.

[41] A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

[42] The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[43] Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy,

en niant son existence et en créant une règle qui exige à la fois une disposition législative établissant la fiducie présumée et une autre la confirmant. Une telle règle est inconnue en droit. Les tribunaux doivent reconnaître les conflits, apparents ou réels, et les résoudre lorsque la chose est possible.

[41] Un courant jurisprudentiel pancanadien a résolu le conflit apparent en faveur de la *LTA*, confirmant ainsi la validité des fiducies réputées à l'égard de la TPS dans le cadre de la *LACC*. Dans l'arrêt déterminant à ce sujet, *Ottawa Senators*, la Cour d'appel de l'Ontario a invoqué la doctrine de l'abrogation implicite et conclu que la disposition postérieure de la *LTA* devait avoir préséance sur la *LACC* (voir aussi *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (B.R. Alb.); *Gauntlet*).

[42] Dans *Ottawa Senators*, la Cour d'appel de l'Ontario a fondé sa conclusion sur deux considérations. Premièrement, elle était convaincue qu'en mentionnant explicitement la *LFI* — mais pas la *LACC* — au par. 222(3) de la *LTA*, le législateur a fait un choix délibéré. Je cite le juge MacPherson :

> [TRADUCTION] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[43] Deuxièmement, la Cour d'appel de l'Ontario a comparé le conflit entre la *LTA* et la *LACC* à celui dont a été saisie la Cour dans *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, et les a jugés [TRADUCTION] « identiques » (par. 46). Elle s'estimait donc tenue de suivre l'arrêt *Doré* (par. 49). Dans cet arrêt, la Cour a conclu qu'une disposition d'une loi de nature plus générale et récemment adoptée établissant un délai de prescription — le *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* ») — avait eu pour effet d'abroger une disposition plus spécifique

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the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

[44] Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

[45] I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists

d'un texte de loi antérieur, la *Loi sur les cités et villes* du Québec, L.R.Q., ch. C-19, avec laquelle elle entrait en conflit. Par analogie, la Cour d'appel de l'Ontario a conclu que le par. 222(3) de la *LTA*, une disposition plus récente et plus générale, abrogeait implicitement la disposition antérieure plus spécifique, à savoir le par. 18.3(1) de la *LACC* (par. 47-49).

[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt *Ottawa Senators* ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la *LACC*, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la *LTA*, en 2000, la modification découlant de l'arrêt *Sparrow Electric*.

[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la *LACC* (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la *LACC* et le par. 67(3) de la *LFI* énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La *LACC* et la *LFI* sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la

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in those Acts carving out an exception for GST claims.

TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.

[46] The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

[46] La logique interne de la *LACC* va également à l'encontre du maintien de la fiducie réputée établie dans la *LTA* à l'égard de la TPS. En effet, la *LACC* impose certaines limites à la suspension par les tribunaux des droits de la Couronne à l'égard des retenues à la source, mais elle ne fait pas mention de la *LTA* (art. 11.4). Comme les fiducies réputées visant les retenues à la source sont explicitement protégées par la *LACC*, il serait incohérent d'accorder une meilleure protection à la fiducie réputée établie par la *LTA* en l'absence de dispositions explicites en ce sens dans la *LACC*. Par conséquent, il semble découler de la logique de la *LACC* que la fiducie réputée établie par la *LTA* est visée par la renonciation du législateur à sa priorité (art. 18.4).

[47] Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

[47] De plus, il y aurait une étrange asymétrie si l'interprétation faisant primer la *LTA* sur la *LACC* préconisée par la Couronne était retenue en l'espèce : les créances de la Couronne relatives à la TPS conserveraient leur priorité de rang pendant les procédures fondées sur la *LACC*, mais pas en cas de faillite. Comme certains tribunaux l'ont bien vu, cela ne pourrait qu'encourager les créanciers à recourir à la loi la plus favorable dans les cas où, comme en l'espèce, l'actif du débiteur n'est pas suffisant pour permettre à la fois le paiement des créanciers garantis et le paiement des créances de la Couronne (*Gauntlet*, par. 21). Or, si les réclamations des créanciers étaient mieux protégées par la liquidation sous le régime de la *LFI*, les créanciers seraient très fortement incités à éviter les procédures prévues par la *LACC* et les risques d'échec d'une réorganisation. Le fait de donner à un acteur clé de telles raisons de s'opposer aux procédures de réorganisation fondées sur la *LACC* dans toute situation d'insolvabilité ne peut que miner les objectifs réparateurs de ce texte législatif et risque au contraire de favoriser les maux sociaux que son édiction visait justement à prévenir.

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[48] Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

[49] Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

[48] Peut-être l'effet de l'arrêt *Ottawa Senators* est-il atténué si la restructuration est tentée en vertu de la *LFI* au lieu de la *LACC*, mais il subsiste néanmoins. Si l'on suivait cet arrêt, la priorité de la créance de la Couronne relative à la TPS différerait selon le régime — *LACC* ou *LFI* — sous lequel la restructuration a lieu. L'anomalie de ce résultat ressort clairement du fait que les compagnies seraient ainsi privées de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la *LACC*, régime privilégié en cas de réorganisations complexes.

[49] Les indications selon lesquelles le législateur voulait que les créances relatives à la TPS soient traitées différemment dans les cas de réorganisations et de faillites sont rares, voire inexistantes. Le paragraphe 222(3) de la *LTA* a été adopté dans le cadre d'un projet de loi d'exécution du budget de nature générale en 2000. Le sommaire accompagnant ce projet de loi n'indique pas que, dans le cadre de la *LACC*, le législateur entendait élever la priorité de la créance de la Couronne à l'égard de la TPS au même rang que les créances relatives aux retenues à la source ou encore à un rang supérieur à celles-ci. En fait, le sommaire mentionne simplement, en ce qui concerne les fiducies réputées, que les modifications apportées aux dispositions existantes visent à « faire en sorte que les cotisations à l'assurance-emploi et au Régime de pensions du Canada qu'un employeur est tenu de verser soient pleinement recouvrables par la Couronne en cas de faillite de l'employeur » (Sommaire de la L.C. 2000, ch. 30, p. 4a). Le libellé de la disposition créant une fiducie réputée à l'égard de la TPS ressemble à celui des dispositions créant de telles fiducies relatives aux retenues à la source et il comporte la même formule dérogatoire et la même mention de la *LFI*. Cependant, comme il a été souligné précédemment, le législateur a expressément précisé que seules les fiducies réputées visant les retenues à la source demeurent en vigueur. Une exception concernant la *LFI* dans la disposition créant les fiducies réputées à l'égard des retenues à la source est sans grande conséquence, car le texte explicite de la *LFI* elle-même (et celui de la *LACC*) établit ces fiducies et maintient leur effet. Il convient toutefois de souligner que ni la *LFI* ni la *LACC* ne comportent de disposition équivalente assurant le maintien en vigueur des fiducies réputées visant la TPS.

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[50] It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

[51] Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

[52] I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough

[50] Il semble plus probable qu'en adoptant, pour créer dans la *LTA* les fiducies réputées visant la TPS, le même libellé que celui utilisé pour les fiducies réputées visant les retenues à la source, et en omettant d'inclure au par. 222(3) de la *LTA* une exception à l'égard de la *LACC* en plus de celle établie pour la *LFI*, le législateur ait par inadvertance commis une anomalie rédactionnelle. En raison d'une lacune législative dans la *LTA*, il serait possible de considérer que la fiducie réputée visant la TPS continue de produire ses effets dans le cadre de la *LACC*, tout en cessant de le faire dans le cas de la *LFI*, ce qui entraînerait un conflit apparent avec le libellé de la *LACC*. Il faut cependant voir ce conflit comme il est : un conflit apparent seulement, que l'on peut résoudre en considérant l'approche générale adoptée envers les créances prioritaires de la Couronne et en donnant préséance au texte de l'art. 18.3 de la *LACC* d'une manière qui ne produit pas un résultat insolite.

[51] Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Il crée simplement un conflit apparent qui doit être résolu par voie d'interprétation législative. L'intention du législateur était donc loin d'être dépourvue d'ambiguïté quand il a adopté le par. 222(3) de la *LTA*. S'il avait voulu donner priorité aux créances de la Couronne relatives à la TPS dans le cadre de la *LACC*, il aurait pu le faire de manière aussi explicite qu'il l'a fait pour les retenues à la source. Or, au lieu de cela, on se trouve réduit à inférer du texte du par. 222(3) de la *LTA* que le législateur entendait que la fiducie réputée visant la TPS produise ses effets dans les procédures fondées sur la *LACC*.

[52] Je ne suis pas convaincue que le raisonnement adopté dans *Doré* exige l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. La question principale dans *Doré* était celle de l'impact de l'adoption du *C.c.Q.* sur les règles de droit administratif relatives aux municipalités. Bien que le juge Gonthier ait conclu, dans cet arrêt, que le délai de prescription établi à l'art. 2930 du *C.c.Q.* avait eu pour effet d'abroger implicitement une disposition de la *Loi sur les cités et villes* portant sur la prescription, sa conclusion n'était pas

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contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

[53] A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

[54] I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding

fondée seulement sur une analyse textuelle. Il a en effet procédé à une analyse contextuelle approfondie des deux textes, y compris de l'historique législatif pertinent (par. 31-41). Par conséquent, les circonstances du cas dont était saisie la Cour dans *Doré* sont loin d'être « identiques » à celles du présent pourvoi, tant sur le plan du texte que sur celui du contexte et de l'historique législatif. On ne peut donc pas dire que l'arrêt *Doré* commande l'application automatique d'une règle d'abrogation implicite.

[53] Un bon indice de l'intention générale du législateur peut être tiré du fait qu'il n'a pas, dans les modifications subséquentes, écarté la règle énoncée dans la *LACC*. D'ailleurs, par suite des modifications apportées à cette loi en 2005, la règle figurant initialement à l'art. 18.3 a, comme nous l'avons vu plus tôt, été reprise sous une formulation différente à l'art. 37. Par conséquent, dans la mesure où l'interprétation selon laquelle la fiducie réputée visant la TPS demeurerait en vigueur dans le contexte de procédures en vertu de la *LACC* repose sur le fait que le par. 222(3) de la *LTA* constitue la disposition postérieure et a eu pour effet d'abroger implicitement le par. 18.3(1) de la *LACC*, nous revenons au point de départ. Comme le législateur a reformulé et renuméroté la disposition de la *LACC* précisant que, sous réserve des exceptions relatives aux retenues à la source, les fiducies réputées ne survivent pas à l'engagement de procédures fondées sur la *LACC*, c'est cette loi qui se trouve maintenant à être le texte postérieur. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS.

[54] Je ne suis pas d'accord avec ma collègue la juge Abella pour dire que l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, permet d'interpréter les modifications de 2005 comme n'ayant aucun effet. La nouvelle loi peut difficilement être considérée comme une simple refonte de la loi antérieure. De fait, la *LACC* a fait l'objet d'un examen approfondi en 2005. En particulier, conformément à son objectif qui consiste à faire concorder l'approche de la *LFI* et celle de la *LACC* à l'égard de l'insolvabilité, le législateur a apporté aux deux textes des modifications allant dans le même sens en ce qui concerne les

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the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

[55] In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

[56] My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

propositions présentées par les entreprises. De plus, de nouvelles dispositions ont été ajoutées au sujet des contrats, des conventions collectives, du financement temporaire et des accords de gouvernance. Des clarifications ont aussi été apportées quant à la nomination et au rôle du contrôleur. Il convient par ailleurs de souligner les limites imposées par l'art. 11.09 de la *LACC* au pouvoir discrétionnaire du tribunal d'ordonner la suspension de l'effet des fiducies réputées créées en faveur de la Couronne relativement aux retenues à la source, limites qui étaient auparavant énoncées à l'art. 11.4. Il n'est fait aucune mention des fiducies réputées visant la TPS (voir le Sommaire de la L.C. 2005, ch. 47). Dans le cadre de cet examen, le législateur est allé jusqu'à se pencher sur les termes mêmes utilisés dans la loi pour écarter l'application des fiducies réputées. Les commentaires cités par ma collègue ne font que souligner l'intention manifeste du législateur de maintenir sa politique générale suivant laquelle seules les fiducies réputées visant les retenues à la source survivent en cas de procédures fondées sur la *LACC*.

[55] En l'espèce, le contexte législatif aide à déterminer l'intention du législateur et conforte la conclusion selon laquelle le par. 222(3) de la *LTA* ne visait pas à restreindre la portée de la disposition de la *LACC* écartant l'application des fiducies réputées. Eu égard au contexte dans son ensemble, le conflit entre la *LTA* et la *LACC* est plus apparent que réel. Je n'adopterais donc pas le raisonnement de l'arrêt *Ottawa Senators* et je confirmerais que l'art. 18.3 de la *LACC* a continué de produire ses effets.

[56] Ma conclusion est renforcée par l'objectif de la *LACC* en tant que composante du régime réparateur instauré la législation canadienne en matière d'insolvabilité. Comme cet aspect est particulièrement pertinent à propos de la deuxième question, je vais maintenant examiner la façon dont les tribunaux ont interprété l'étendue des pouvoirs discrétionnaires dont ils disposent lorsqu'ils surveillent une réorganisation fondée sur la *LACC*, ainsi que la façon dont le législateur a dans une large mesure entériné cette interprétation. L'interprétation de la *LACC* par les tribunaux aide en fait à comprendre comment celle-ci en est venue à jouer un rôle si important dans le droit canadien de l'insolvabilité.

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3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

[57] Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

[58] *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

[59] Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a *LACC* est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]'histoire du droit relatif à la LACC correspond à l'évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la *LACC* découlent souvent de l'exercice discrétionnaire de certains pouvoirs. C'est principalement au fil de l'exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la *LACC* a évolué de façon graduelle et s'est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L'exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la *LACC*. Le caractère réparateur dont j'ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l'un des premiers exemples :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la *LACC* comporte plusieurs aspects. Le tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

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staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

[61] When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la *LACC* ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la *LACC*. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la *LACC*, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

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[62] Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

[62] L'utilisation la plus créative des pouvoirs conférés par la *LACC* est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir, p. ex., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La *LACC* a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la *LACC*, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

[63] Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during *CCAA* proceedings? (2) What are the limits of this authority?

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la *LACC* n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la *LACC*? (2) Quelles sont les limites de ces pouvoirs?

[64] The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la *LACC* et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la *LACC*, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

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purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

[65] I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

[66] Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

[67] The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d'appel ont déconseillé aux tribunaux d'invoquer leur compétence inhérente, concluant qu'il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu'interpréter les pouvoirs se trouvant dans la *LACC* elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[65] Je suis d'accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procèdent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu'on lui donne l'interprétation téléologique et large qui s'impose, la *LACC* permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

[66] L'examen des parties pertinentes de la *LACC* et de l'évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la *LACC* relève de l'interprétation législative. D'ailleurs, à cet égard, il faut souligner d'une façon particulière que le texte de loi dont il est question en l'espèce peut être interprété très largement.

[67] En vertu du pouvoir conféré initialement par la *LACC*, le tribunal pouvait, « chaque fois qu'une demande [était] faite sous le régime de la présente loi à l'égard d'une compagnie, [. . .] sur demande

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matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

[69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

[70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all

d'un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l'ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l'espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l'art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu'il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d'une demande initiale que d'une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu'elle est indiquée et qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s'agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l'objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. J'ajouterais que le critère de l'opportunité s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. Les tribunaux

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stakeholders are treated as advantageously and fairly as the circumstances permit.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

[72] The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

[73] In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

doivent se rappeler que les chances de succès d'une réorganisation sont meilleures lorsque les participants arrivent à s'entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu'il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l'échec » (voir *Chef Ready*, p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l'ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l'habilite à rendre à cette ordonnance.

[72] L'analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l'encontre de la Couronne, une fois qu'il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d'appel, le juge Tysoe a conclu que la *LACC* n'habilitait pas le tribunal à maintenir la suspension des mesures d'exécution de la Couronne à l'égard de la fiducie réputée visant la TPS après l'arrêt des efforts de réorganisation. Selon l'appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l'objectif fondamental de la *LACC* et n'a pas donné à ce texte l'interprétation téléologique et large qu'il convient de lui donner et qui autorise le prononcé d'une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d'autre choix que d'autoriser les mesures d'exécution à l'endroit de la fiducie réputée visant la TPS lorsqu'il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J'ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l'ordonnance était autorisée par la *LACC*.

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[74] It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

[75] The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

[76] There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament . . . that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établit une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

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the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

[77] The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

[78] Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [. . .] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [l]es deux lois sont

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lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

[79] The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

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to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

[81] I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Express Trust*

3.4 *Fiducie expresse*

[82] The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

[83] Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

[84] Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

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[85] At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

[86] The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

[87] Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear

[85] Au moment où l'ordonnance a été rendue, il y avait un différend entre Century Services et la Couronne au sujet d'une partie du produit de la vente des biens du débiteur. La solution retenue par le tribunal a consisté à accepter, selon la proposition de LeRoy Trucking, que la somme en question soit détenue séparément jusqu'à ce que le différend puisse être réglé. Par conséquent, il n'existait aucune certitude que la Couronne serait véritablement le bénéficiaire ou l'objet de la fiducie.

[86] Le fait que le compte choisi pour conserver séparément la somme en question était le compte en fiducie du contrôleur n'a pas à lui seul un effet tel qu'il suppléerait à l'absence d'un bénéficiaire certain. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à la priorité de rang, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question. Cependant, il se peut fort bien que le juge en chef Brenner ait estimé que, conformément à l'arrêt *Ottawa Senators*, la créance de la Couronne à l'égard de la TPS demeurerait effective si la réorganisation aboutissait, ce qui ne serait pas le cas si le passage au processus de liquidation régi par la *LFI* était autorisé. Une somme équivalente à cette créance serait ainsi mise de côté jusqu'à ce que le résultat de la réorganisation soit connu.

[87] Par conséquent, l'incertitude entourant l'issue de la restructuration tentée sous le régime de la *LACC* exclut l'existence d'une certitude permettant de conférer de manière permanente à la Couronne un intérêt bénéficiaire sur la somme en question. Cela ressort clairement des motifs exposés de vive voix par le juge en chef Brenner le 29 avril 2008, lorsqu'il a dit : [TRADUCTION] « Comme il est notoire que [des procédures fondées sur la *LACC*] peuvent échouer et que cela entraîne des faillites, le maintien du statu quo en l'espèce me semble militer en faveur de l'acceptation de la proposition d'ordonner au contrôleur de détenir ces fonds en fiducie. » Il y avait donc manifestement un doute quant à la question de savoir qui au juste pourrait toucher l'argent

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that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

[88] I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

[89] For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. —

I

[90] I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

en fin de compte. L'ordonnance ultérieure du juge en chef Brenner — dans laquelle ce dernier a rejeté, le 3 septembre 2008, la demande de la Couronne sollicitant le bénéfice de la fiducie présumée après qu'il fut devenu évident que la faillite était inévitable — confirme l'absence du bénéficiaire certain sans lequel il ne saurait y avoir de fiducie expresse.

4. Conclusion

[88] Je conclus que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne sollicitant le bénéfice de la fiducie réputée visant la TPS, tout en levant par ailleurs la suspension des procédures de manière à permettre à LeRoy Trucking de faire cession de ses biens. Ma conclusion selon laquelle le par. 18.3(1) de la *LACC* neutralisait la fiducie réputée visant la TPS pendant la durée des procédures fondées sur cette loi confirme que les pouvoirs discrétionnaires exercés par le tribunal en vertu de l'art. 11 n'étaient pas limités par la priorité invoquée par la Couronne au titre de la TPS, puisqu'il n'existe aucune priorité de la sorte sous le régime de la *LACC*.

[89] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de déclarer que la somme de 305 202,30 $ perçue par LeRoy Trucking au titre de la TPS mais non encore versée au receveur général du Canada ne fait l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Cette somme ne fait pas non plus l'objet d'une fiducie expresse. Les dépens sont accordés à l'égard du présent pourvoi et de l'appel interjeté devant la juridiction inférieure.

Version française des motifs rendus par

LE JUGE FISH —

I

[90] Je souscris dans l'ensemble aux motifs de la juge Deschamps et je disposerais du pourvoi comme elle le propose.

[91] Plus particulièrement, je me rallie à son interprétation de la portée du pouvoir discrétionnaire conféré au juge par l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C.

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And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

[93] In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

[94] Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

[95] Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

1985, ch. C-36 (« *LACC* »). Je partage en outre sa conclusion suivant laquelle le juge en chef Brenner n'a pas créé de fiducie expresse en faveur de la Couronne en ordonnant que les sommes recueillies au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] J'estime néanmoins devoir ajouter de brefs motifs qui me sont propres au sujet de l'interaction entre la *LACC* et la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »).

[93] En maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), et les décisions rendues dans sa foulée ont eu pour effet de protéger indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. À mon avis, il convient en l'espèce de rompre nettement avec ce courant jurisprudentiel.

[94] La juge Deschamps expose d'importantes raisons d'ordre historique et d'intérêt général à l'appui de cette position et je n'ai rien à ajouter à cet égard. Je tiens toutefois à expliquer pourquoi une analyse comparative de certaines dispositions législatives connexes vient renforcer la conclusion à laquelle ma collègue et moi-même en arrivons.

[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la *LACC* et l'art. 222 de la *LTA* d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.

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II

[96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

[97] This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

[98] The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), where s. 227(4) *creates* a deemed trust:

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

[99] In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person . . . equal in value to the amount so deemed to be held in trust is deemed

(*a*) to be held, from the time the amount was deducted or withheld by the person, separate and

II

[96] Dans le contexte du régime canadien d'insolvabilité, on conclut à l'existence d'une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui *crée* la fiducie et, en second lieu, une disposition de la *LACC* ou de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* ») qui *confirme* l'existence de la fiducie ou la maintient explicitement en vigueur.

[97] Cette interprétation se retrouve dans trois lois fédérales, qui renferment toutes une disposition relative aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*.

[98] La première est la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), dont le par. 227(4) *crée* une fiducie réputée :

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi. [Dans la présente citation et dans celles qui suivent, les soulignements sont évidemment de moi.]

[99] Dans le paragraphe suivant, le législateur prend la peine de bien préciser que toute disposition législative fédérale ou provinciale à l'effet contraire n'a aucune incidence sur la fiducie ainsi constituée :

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne [. . .] d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu,

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apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

. . . .

. . . and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

. . . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[100] The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

[100] Le maintien en vigueur de cette fiducie réputée est expressément *confirmé* à l'art. 18.3 de la *LACC* :

18.3(1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[101] The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

[101] L'application de la fiducie réputée prévue par la *LIR* est également confirmée par l'art. 67 de la *LFI* :

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[102] Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

[102] Par conséquent, le législateur a *créé*, puis *confirmé le maintien en vigueur* de la fiducie réputée établie par la *LIR* en faveur de Sa Majesté *tant* sous le régime de la *LACC que* sous celui de la *LFI*.

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[103] The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

[104] As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

[105] The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[106] The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a

[103] La deuxième loi fédérale où l'on retrouve ce mécanisme est le *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8 (« *RPC* »). À l'article 23, le législateur crée une fiducie réputée en faveur de la Couronne et précise qu'elle existe malgré les dispositions contraires de toute autre loi fédérale. Enfin, la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23 (« *LAE* »), crée dans des termes quasi identiques, une fiducie réputée en faveur de la Couronne : voir les par. 86(2) et (2.1).

[104] Comme nous l'avons vu, le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions de la *LIR*, du *RPC* et de la *LAE* est confirmé au par. 18.3(2) de la *LACC* et au par. 67(3) de la *LFI*. Dans les trois cas, le législateur a exprimé en termes clairs et explicites sa volonté de voir la fiducie réputée établie en faveur de la Couronne produire ses effets pendant le déroulement de la procédure d'insolvabilité.

[105] La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne *confirme* pas l'existence de la fiducie — ni ne prévoit expressément le maintien en vigueur de celle-ci — dans la *LFI* ou dans la *LACC*. Le second des deux éléments obligatoires que j'ai mentionnés fait donc défaut, ce qui témoigne de l'intention du législateur de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

[106] Le texte des dispositions en cause de la *LTA* est substantiellement identique à celui des dispositions de la *LIR*, du *RPC* et de la *LAE* :

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit

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security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

. . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, . . .

. . . and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[107] Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

[108] In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

[109] With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust

versé au receveur général ou retiré en application du paragraphe (2).

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[107] Pourtant, aucune disposition de la *LACC* ne prévoit le maintien en vigueur de la fiducie réputée une fois que la *LACC* entre en jeu.

[108] En résumé, le législateur a imposé *deux* conditions explicites — ou « composantes de base » — devant être réunies pour que survivent, sous le régime de la *LACC*, les fiducies réputées qui ont été établies par la *LIR*, le *RPC* et la *LAE*. S'il avait voulu préserver de la même façon, sous le régime de la *LACC*, les fiducies réputées qui sont établies par la *LTA*, il aurait inséré dans la *LACC* le type de disposition confirmatoire qui maintient explicitement en vigueur d'autres fiducies réputées.

[109] Avec égards pour l'opinion contraire exprimée par le juge Tysoe de la Cour d'appel, je ne trouve pas [TRADUCTION] « inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception » (2009 BCCA

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provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

[110] Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

[111] Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

[112] Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada

205, 98 B.C.L.R. (4th) 242, par. 37). *Toutes* les dispositions établissant des fiducies réputées qui sont reproduites ci-dessus font explicitement mention de la *LFI*. L'article 222 de la *LTA* ne rompt pas avec ce modèle. Compte tenu du libellé presque identique des quatre dispositions établissant une fiducie réputée, il aurait d'ailleurs été étonnant que le législateur ne fasse aucune mention de la *LFI* dans la *LTA*.

[110] L'intention du législateur était manifestement de rendre inopérantes les fiducies réputées visant la TPS dès l'introduction d'une procédure d'insolvabilité. Par conséquent, l'art. 222 mentionne la *LFI* de manière à l'*exclure* de son champ d'application — et non de l'y *inclure*, comme le font la *LIR*, le *RPC* et la *LAE*.

[111] En revanche, je constate qu'*aucune* de ces lois ne mentionne expressément la *LACC*. La mention explicite de la *LFI* dans ces textes n'a aucune incidence sur leur interaction avec la *LACC*. Là encore, ce sont les dispositions confirmatoires que l'on trouve *dans les lois sur l'insolvabilité* qui déterminent si une fiducie réputée continuera d'exister durant une procédure d'insolvabilité.

[112] Enfin, j'estime que les juges siégeant en leur cabinet ne devraient pas, comme cela s'est produit en l'espèce, ordonner que les sommes perçues au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur pendant le déroulement d'une procédure fondée sur la *LACC*. Il résulte du raisonnement de la juge Deschamps que les réclamations de TPS deviennent des créances non garanties sous le régime de la *LACC*. Le législateur a délibérément décidé de supprimer certaines superpriorités accordées à la Couronne pendant l'insolvabilité; nous sommes en présence de l'un de ces cas.

III

[113] Pour les motifs qui précèdent, je suis d'avis, à l'instar de la juge Deschamps, d'accueillir le pourvoi avec dépens devant notre Cour et devant les juridictions inférieures, et d'ordonner que la somme de 305 202,30 $ — qui a été perçue par LeRoy Trucking

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be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

[114] ABELLA J. (dissenting) — The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

[115] Section 11[1] of the *CCAA* stated:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

1 Section 11 was amended, effective September 18, 2009, and now states:

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

au titre de la TPS mais n'a pas encore été versée au receveur général du Canada — ne fasse l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne.

Version française des motifs rendus par

[114] LA JUGE ABELLA (dissidente) — La question qui est au cœur du présent pourvoi est celle de savoir si l'art. 222 de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), et plus particulièrement le par. 222(3), donnent préséance, dans le cadre d'une procédure relevant de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. À l'instar du juge Tysoe de la Cour d'appel, j'estime que tel est le cas. Il s'ensuit, à mon avis, que le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC* est circonscrit en conséquence.

[115] L'article 11[1] de la *LACC* disposait :

11. (1) Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

Pour être en mesure de déterminer la portée du pouvoir discrétionnaire conféré au tribunal par l'art. 11, il est nécessaire de trancher d'abord la question de la priorité. Le paragraphe 222(3), la disposition de la *LTA* en cause en l'espèce, prévoit ce qui suit :

1 L'article 11 a été modifié et le texte modifié, qui est entré en vigueur le 18 septembre 2009, est rédigé ainsi :

11. Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

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(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[116] Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

18.3 (1) . . . [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[117] As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[116] Selon Century Services, la disposition dérogatoire générale de la *LACC*, le par. 18.3(1), l'emportait, et les dispositions déterminatives à l'art. 222 de la *LTA* étaient par conséquent inapplicables dans le cadre d'une procédure fondée sur la *LACC*. Le paragraphe 18.3(1) dispose :

18.3 (1) . . . [P]ar dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[117] Ainsi que l'a fait observer le juge d'appel MacPherson, dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), le par. 222(3) de la *LTA* [TRADUCTION] « entre nettement en conflit » avec le par. 18.3(1) de la *LACC* (par. 31). Essentiellement, la résolution du conflit entre ces deux dispositions requiert à mon sens une

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interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

[118] By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* . . . . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[119] MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from

opération relativement simple d'interprétation des lois : Est-ce que les termes employés révèlent une intention claire du législateur? À mon avis, c'est le cas. Le texte de la disposition créant une fiducie réputée, soit le par. 222(3) de la *LTA*, précise sans ambiguïté que cette disposition s'applique malgré toute autre règle de droit sauf la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »).

[118] En excluant explicitement une seule loi du champ d'application du par. 222(3) et en déclarant de façon non équivoque qu'il s'applique malgré toute autre loi ou règle de droit au Canada *sauf* la *LFI*, le législateur a défini la portée de cette disposition dans des termes on ne peut plus clairs. Je souscris sans réserve aux propos suivants du juge d'appel MacPherson dans l'arrêt *Ottawa Senators* :

> [TRADUCTION] L'intention du législateur au par. 222(3) de la *LTA* est claire. En cas de conflit avec « tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) », c'est le par. 222(3) qui l'emporte. En employant ces mots, le législateur fédéral a fait deux choses : il a décidé que le par. 222(3) devait l'emporter sur tout autre texte législatif fédéral et, fait important, il a abordé la question des exceptions à cette préséance en en mentionnant une seule, la *Loi sur la faillite et l'insolvabilité* [. . .] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[119] L'opinion du juge d'appel MacPherson suivant laquelle le fait que la *LACC* n'ait pas été soustraite à l'application de la *LTA* témoigne d'une intention claire du législateur est confortée par la façon dont la *LACC* a par la suite été modifiée après l'édiction du par. 18.3(1) en 1997. En 2000, lorsque le par. 222(3) de la *LTA* est entré en vigueur, des modifications ont également été apportées à la *LACC*, mais le par. 18.3(1) de cette loi n'a pas été modifié.

[120] L'absence de modification du par. 18.3(1) vaut d'être soulignée, car elle a eu pour effet de maintenir le statu quo législatif, malgré les

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various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

demandes répétées de divers groupes qui souhaitaient que cette disposition soit modifiée pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. En 2002, par exemple, lorsque Industrie Canada a procédé à l'examen de la *LFI* et de la *LACC*, l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ont recommandé que les règles de la *LFI* en matière de priorité soient étendues à la *LACC* (Joint Task Force on Business Insolvency Law Reform, *Report* (15 mars 2002), ann. B, proposition 71). Ces recommandations ont été reprises en 2003 par le Comité sénatorial permanent des banques et du commerce dans son rapport intitulé *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, ainsi qu'en 2005 par le Legislative Review Task Force (Commercial) de l'Institut d'insolvabilité du Canada et de l'Association canadienne des professionnels de l'insolvabilité *et de la* réorganisation dans son *Report on the Commercial Provisions of Bill C-55*, et en 2007 par l'Institut d'insolvabilité du Canada dans un mémoire soumis au Comité sénatorial permanent des banques et du commerce au sujet de réformes alors envisagées.

[121] Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

[121] La *LFI* demeure néanmoins la seule loi soustraite à l'application du par. 222(3) de la *LTA*. Même à la suite de l'arrêt rendu en 2005 dans l'affaire *Ottawa Senators*, qui a confirmé que la *LTA* l'emportait sur la *LACC*, le législateur n'est pas intervenu. Cette absence de réaction de sa part me paraît tout aussi pertinente en l'espèce que dans l'arrêt *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, où la Cour a déclaré ceci :

> Le silence du législateur n'est pas nécessairement déterminant quant à son intention, mais en l'espèce, il répond à la demande pressante de Telus et des autres entreprises et organisations intéressées que la loi prévoie expressément la possibilité d'un remboursement des frais raisonnables engagés pour communiquer des éléments de preuve conformément à une ordonnance. L'historique législatif confirme selon moi que le législateur n'a pas voulu qu'une indemnité soit versée pour l'obtempération à une ordonnance de communication. [par. 42]

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[122] All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

[123] Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

[124] Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

[122] Tout ce qui précède permet clairement d'inférer que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

[123] Je ne vois pas non plus de « considération de politique générale » qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur. Je ne saurais expliquer mieux que ne l'a fait le juge d'appel Tysoe les raisons pour lesquelles l'argument invoquant des considérations de politique générale ne peut, selon moi, être retenu en l'espèce. Je vais donc reprendre à mon compte ses propos à ce sujet :

> [TRADUCTION] Je ne conteste pas qu'il existe des raisons de politique générale valables qui justifient d'inciter les entreprises insolvables à tenter de se restructurer de façon à pouvoir continuer à exercer leurs activités avec le moins de perturbations possibles pour leurs employés et pour les autres intéressés. Les tribunaux peuvent légitimement tenir compte de telles considérations de politique générale, mais seulement si elles ont trait à une question que le législateur n'a pas examinée. Or, dans le cas qui nous occupe, il y a lieu de présumer que le législateur a tenu compte de considérations de politique générale lorsqu'il a adopté les modifications susmentionnées à la *LACC* et à la *LTA*. Comme le juge MacPherson le fait observer au par. 43 de l'arrêt *Ottawa Senators*, il est inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception. Je signale par ailleurs que les modifications apportées en 1992 à la *LFI* ont permis de rendre les propositions concordataires opposables aux créanciers garantis et que, malgré la plus grande souplesse de la *LACC*, il est possible pour une compagnie insolvable de se restructurer sous le régime de la *LFI*. [par. 37]

[124] Bien que je sois d'avis que la clarté des termes employés au par. 222(3) tranche la question, j'estime également que cette conclusion est même renforcée par l'application d'autres principes d'interprétation. Dans leurs observations, les parties indiquent que les principes suivants étaient, selon elles, particulièrement pertinents : la Couronne a invoqué le principe voulant que la loi « postérieure » l'emporte; Century Services a fondé son argumentation sur le principe de la préséance de la loi spécifique sur la loi générale (*generalia specialibus non derogant*).

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[125] The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

[126] The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

[127] The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> . . . the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, . . . at p. 239 . . . :
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the

[125] Le principe de la préséance de la « loi postérieure » accorde la priorité à la loi la plus récente, au motif que le législateur est présumé connaître le contenu des lois alors en vigueur. Si, dans la loi nouvelle, le législateur adopte une règle inconciliable avec une règle préexistante, on conclura qu'il a entendu déroger à celle-ci (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 346-347; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3e éd. 2000), p. 358).

[126] L'exception à cette supplantation présumée des dispositions législatives préexistantes incompatibles réside dans le principe exprimé par la maxime *generalia specialibus non derogant* selon laquelle une disposition générale plus récente n'est pas réputée déroger à une loi spéciale antérieure (Côté, p. 359). Comme dans le jeu des poupées russes, cette exception comporte elle-même une exception. En effet, une disposition spécifique antérieure peut dans les faits être « supplantée » par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale (*Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862).

[127] Ces principes d'interprétation visent principalement à faciliter la détermination de l'intention du législateur, comme l'a confirmé le juge d'appel MacPherson dans l'arrêt *Ottawa Senators*, au par. 42 :

> [TRADUCTION] . . . en matière d'interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l'intention du législateur lorsqu'il a adopté la loi. Cette règle fondamentale l'emporte sur toutes les maximes, outils ou canons d'interprétation législative, y compris la maxime suivant laquelle le particulier l'emporte sur le général (*generalia specialibus non derogant*). Comme l'a expliqué le juge Hudson dans l'arrêt *Canada c. Williams*, [1944] R.C.S. 226, [. . .] à la p. 239 . . . :
>
> > On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n'est pas une règle de droit mais un principe d'interprétation, cède le pas

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legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

[128] I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

[129] It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(*f*)). It directs that new enactments not be construed as

2 The amendments did not come into force until September 18, 2009.

devant l'intention du législateur, s'il est raisonnablement possible de la dégager de l'ensemble des dispositions législatives pertinentes.

(Voir aussi Côté, p. 358, et Pierre-André Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), par. 1335.)

[128] J'accepte l'argument de la Couronne suivant lequel le principe de la loi « postérieure » est déterminant en l'espèce. Comme le par. 222(3) de la *LTA* a été édicté en 2000 et que le par. 18.3(1) de la *LACC* a été adopté en 1997, le par. 222(3) est, de toute évidence, la disposition postérieure. Cette victoire chronologique peut être neutralisée si, comme le soutient Century Services, on démontre que la disposition la plus récente, le par. 222(3) de la *LTA*, est une disposition générale, auquel cas c'est la disposition particulière antérieure, le par. 18.3(1), qui l'emporte (*generalia specialibus non derogant*). Mais, comme nous l'avons vu, la disposition particulière antérieure n'a pas préséance si la disposition générale ultérieure paraît la « supplanter ». C'est précisément, à mon sens, ce qu'accomplit le par. 222(3) de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » *sauf la LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3).

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005[2], le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l'opinion exprimée par ma collègue, cette observation est réfutée par l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l'effet (inexistant) qu'a le remplacement — sans modifications notables sur le fond — d'un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

2 Les modifications ne sont entrées en vigueur que le 18 septembre 2009.

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"new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

* * *

(*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an "enactment" as "an Act or regulation or any portion of an Act or regulation".

[130] Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[131] The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the

la disposition qui a précédé l'al. 44*f*)). Cet alinéa précise que le nouveau texte ne doit pas être considéré de « droit nouveau », sauf dans la mesure où il diffère au fond du texte abrogé :

44. En cas d'abrogation et de remplacement, les règles suivantes s'appliquent :

* * *

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

Le mot « texte » est défini ainsi à l'art. 2 de la *Loi d'interprétation* : « Tout ou partie d'une loi ou d'un règlement. »

[130] Le paragraphe 37(1) de la *LACC* actuelle est pratiquement identique quant au fond au par. 18.3(1). Pour faciliter la comparaison de ces deux dispositions, je les ai reproduites ci-après :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[131] L'application de l'al. 44*f*) de la *Loi d'interprétation* vient tout simplement confirmer l'intention clairement exprimée par le législateur, qu'a indiquée Industrie Canada dans l'analyse du Projet de loi C-55, où le par. 37(1) était qualifié de « modification d'ordre technique concernant le réaménagement des dispositions de la présente loi ». Par ailleurs, durant la deuxième lecture du projet de loi

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Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

[132] Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

[133] This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

[134] While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request

au Sénat, l'honorable Bill Rompkey, qui était alors leader adjoint du gouvernement au Sénat, a confirmé que le par. 37(1) représentait seulement une modification d'ordre technique :

> Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la LACC, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la LACC.

(*Débats du Sénat*, vol. 142, 1re sess., 38e lég., 23 novembre 2005, p. 2147)

[132] Si le par. 18.3(1) avait fait l'objet de modifications notables sur le fond lorsqu'il a été remplacé par le par. 37(1), je me rangerais à l'avis de la juge Deschamps qu'il doit être considéré comme un texte de droit nouveau. Mais comme les par. 18.3(1) et 37(1) ne diffèrent pas sur le fond, le fait que le par. 18.3(1) soit devenu le par. 37(1) n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure » (Sullivan, p. 347).

[133] Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. La question qui se pose alors est celle de savoir quelle est l'incidence de cette préséance sur le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC*.

[134] Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, L.R.C. 1985, ch. W-11, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi *autre* que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1) ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent,

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for payment of the GST funds during the *CCAA* proceedings.

[135] Given this conclusion, it is unnecessary to consider whether there was an express trust.

[136] I would dismiss the appeal.

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

[135] Vu cette conclusion, il n'est pas nécessaire d'examiner la question de savoir s'il existait une fiducie expresse en l'espèce.

[136] Je rejetterais le présent pourvoi.

ANNEXE

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 13 décembre 2007)

11. (1) [Pouvoir du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

(3) [Demande initiale — ordonnances] Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(4) [Autres demandes — ordonnances] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

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(*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(6) [Preuve] Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

11.4 (1) [Suspension des procédures] Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

(i) à l'expiration de l'ordonnance rendue en application de l'article 11,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

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(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) la suspension de l'exercice par Sa Majesté du chef d'une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(2) [Cessation] L'ordonnance cesse d'être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou

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as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person

d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne,

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and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same

ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(3) [Effet] Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n'ont pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou

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effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

18.3 (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

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18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and

18.4 (1) [Réclamations de la Couronne] Dans le cadre de procédures intentées sous le régime de la présente loi, toutes les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii),

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in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. [General power of court] Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) [Stays, etc. — initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. — other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

11. [Pouvoir général du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

11.02 (1) [Suspension : demande initiale] Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(2) [Suspension : demandes autres qu'initiales] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)*a*);

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(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.09 (1) [Stay — Her Majesty] An order made under section 11.02 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income*

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(3) [Preuve] Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition

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Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the

législative de cette province à l'égard d'une compagnie qui est un débiteur visé par la loi provinciale, s'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(2) [Cessation d'effet] Les passages de l'ordonnance qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*) cessent d'avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l'égard de toute somme qui devient due à Sa Majesté après le prononcé de l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la

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collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection

perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

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3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L'ordonnance prévue à l'article 11.02, à l'exception des passages de celle-ci qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*), n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

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37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured

37. (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des sommes réputées détenues en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, si, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

222. (1) [Montants perçus détenus en fiducie] La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la

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creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

(3) [Non-versement ou non-retrait] Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

67. (1) [Biens du failli] Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

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(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b.1*) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

b.1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas *a*) et *b*),

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

(2) [Fiducies présumées] Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) [Exceptions] Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

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(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Exceptions] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) [Réclamations de la Couronne] Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

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(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Appeal allowed with costs, ABELLA J. *dissenting.*

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

Pourvoi accueilli avec dépens, la juge ABELLA *est dissidente.*

Procureurs de l'appelante : Fraser Milner Casgrain, Vancouver.

Procureur de l'intimé : Procureur général du Canada, Vancouver.

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Tab C

Most Negative Treatment: Distinguished
Most Recent Distinguished: Sommerer v. R. | 2011 TCC 212, 2011 CCI 212, 2011 CarswellNat 1157, 2011 CarswellNat 4026, 2011 D.T.C. 1162 (Eng.), [2011] 4 C.T.C. 2068, 204 A.C.W.S. (3d) 674 | (T.C.C. [General Procedure], Apr 14, 2011)

1988 CarswellOnt 112
Ontario Supreme Court, Court of Appeal

Trident Holdings Ltd. v. Danand Investments Ltd.

1988 CarswellOnt 112, [1988] C.L.D. 864, [1988] O.J. No. 355, 25 O.A.C. 378, 30 E.T.R. 67, 39 B.L.R. 296, 49 D.L.R. (4th) 1, 64 O.R. (2d) 65, 9 A.C.W.S. (3d) 241

TRIDENT HOLDINGS LTD. c.o.b. TRIDENT ELECTRIC v. DANAND INVESTMENTS et al.

Howland C.J.O., Morden and Tarnopolsky JJ.A.

Heard: March 3, 4, 1988
Judgment: April 8, 1988
Docket: Doc. No. CA 413/86

Counsel: *Jack B. Berkow* and *Sheryl E. Seigel*, for appellants.
Robert D. Malen, for respondent.

Subject: Corporate and Commercial; Estates and Trusts; Contracts; Torts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Commercial law

I Agency
I.2 Agency distinguished from other relationships
I.2.a General principles

Construction law

II Contracts
II.1 Building contracts
II.1.a Execution of formal contract
II.1.a.iii Acceptance
II.1.a.iii.B Miscellaneous

Headnote

Agency --- Agency distinguished from other relationships — General

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Construction Law --- Building contract — Execution of formal contract — General

Contracts — Formation — Conditions — Incorporation of terms — Parties signing contract containing "alternate" provision providing for lower cost if certain conditions fulfilled — When conditions not fulfilled, contract still remaining on original terms — Clause in standard form contract generally used by one of parties but not signed by parties not to be incorporated in interpreting agreement.

Agency — Trusteeship — Liability of principals and beneficiaries — Trustee also acting as agent of beneficiaries — Beneficiaries liable on contract executed by trustee.

D Ltd. was a trustee for six beneficiaries pursuant to an agreement dated February 5, 1982, and registered owner of a development project comprised of two apartment buildings. T Ltd., an electrical contractor, submitted a proposal to D Ltd. for the project's electrical work. The proposal price, based on D Ltd.'s plans and specifications, was originally $997,000, but the parties agreed, pursuant to telephone conversations, to reduce this price to $955,000. At a meeting on February 18, 1982, the parties agreed to reduce the price to $952,000 as well as to other changes in the proposal. An "ALTERNATE" provision provided that the quoted price could be reduced by $30,000 if certain requirements were met. T Ltd. was awarded the contract but D Ltd. abandoned the project about 6 weeks later. T Ltd. brought an action for damages for breach of a written contract against D Ltd. as agent together with the undisclosed beneficiaries as principals. The trial Judge found in favour of T Ltd. holding that the original contract was for $952,000 with the alternative option of being performed for $922,000 if certain optional requirements were met, and that these requirements were in fact met. D Ltd. and the six beneficiaries appealed.

Held:

The appeal was allowed in part.

The evidence did not support the trial Judge's conclusion that the alternative option requirements were met. Addendum No. 1, issued by D Ltd.'s engineers, represented only some of the changes (which could have brought further cost savings) proposed by T Ltd. pursuant to the alternative option requirements, and the parties had not agreed that Addendum No. 1 satisfied the alternate provision's terms. There was thus no contractual foundation to support the award of an additional $27,000 to T Ltd., and so this amount was disallowed.

The contract signed by the parties was a complete contract. The trial Judge correctly declined to find by implication that the contract contained a provision in D Ltd.'s standard form of contract that the contract became null and void upon D Ltd.'s decision to make a material change in the plans. The standard form was not signed by the parties.

The trial Judge correctly found an agency relationship existing between D Ltd. and the six beneficiaries. A trustee is not subject to the control of his beneficiary but must deal with the trust property for the benefit of the beneficiary in accordance with the terms of the trust. A person may be both agent of and trustee for another. Where he undertakes to act on behalf of the other and subject to his control, he is an agent; but where he is vested with the title to property that he holds for his principal, he is also a trustee. In such circumstances, however, the agency relationship predominates and the principles of agency, rather than the principles of trust, are applicable.

While the beneficiaries of a trust are not personally liable to third parties on obligations incurred by the trustee in the

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administration of the trust, an agent, acting within the scope of his employment, can subject his principal to personal liability in contract and in tort. Thus, where the trustee is also an agent of the beneficiaries, the beneficiaries are personally liable upon contracts made by the trustee in the administration of the trust, unless otherwise provided in the contracts, as well as to third persons for torts committed by the trustee in the administration of the trust. The beneficiaries are not personally liable if the trustee is merely a trustee. However, where the beneficiaries have power to control the conduct of the trustee to such an extent that the trustee is their agent, the beneficiaries are personally liable as principals. There must be sufficient power of control over the trustee so that there is an agency relationship and not merely a trust in order for the beneficiaries to be liable as partners in the carrying on of the business.

The land involved in this action was registered in the name of D Ltd., Trustee. The trust terms were established by an agreement dated February 5, 1982, between the six beneficiaries and D Ltd. and D Ltd. was described in this agreement as bare nominee and trustee. No powers were conferred upon it. Implicit in this agreement was that D Ltd.'s function was simply to hold legal title to the land and do the bidding of the beneficiaries. The main purpose of the agreement was to establish, in detail, the rights and obligations of the parties to it with respect to the development of the land. As far as the contract with T Ltd. was concerned, D Ltd. was not exercising any power conferred on it by the trust agreement, or ownership rights but was carrying out the mandate of the beneficiaries. The agency relationship predominated over the trust relationship. The trial Judge, therefore, was correct in concluding that the beneficiaries were liable on the agreement.

Table of Authorities

Cases considered:

Creasor v. Wall (1983), 38 O.R. (2d) 35, 25 R.P.R. 1 (Ont. H.C.), reversed (1983), 40 O.R. (2d) 644, 27 R.P.R. 8 (Ont. C.A.) — *referred to*

Dolly Varden Mines Ltd. (N.P.L.) v. Sunrise Exploration Ltd. (1967), 64 D.L.R. (2d) 283 (B.C. S.C.), varied (1968), 69 D.L.R. (2d) 209 (B.C. C.A.), affirmed [1970] S.C.R. 2, 70 W.W.R. 418, 8 D.L.R. (3d) 441 (S.C.C.) — *considered*

Garnac Grain Co. v. H.M.F. Faure & Fairclough Ltd., [1968] A.C. 1130 — *referred to*

Mills v. Tibbetts (1916), 11 O.W.N. 251 — *referred to*

Napev Construction Ltd. v. Lebedinsky (1984), 7 C.L.R. 57 (Ont. H.C.) — *considered*

Parkview Towers of Hamilton Ltd. v. Cdn. Imperial Bank of Commerce (1980), 30 O.R. (2d) 294, 17 R.P.R. 291, 9 E.T.R. 113, 118 D.L.R. (3d) 384 (Ont. H.C.), affirmed (1981), 31 O.R. (2d) 233 (Ont. C.A.) — *considered*

Prince v. Gundy, [1936] O.W.N. 397 — *referred to*

Statutes considered:

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Mortgages Act, R.S.O. 1970, c. 279 —

s. 19(2)

Rules considered:

Ontario Rules of Civil Procedure —

r. 25.07(4)

Authorities considered:

Bowstead on Agency (15th ed., 1985).

Cullity, Maurice C., "Liability of Beneficiaries — A Rejoinder" (1985), 7 E. & T. Q. 35.

Cullity, Maurice C., "Liability of Beneficiaries — A Further Rejoinder to Mr. Flannigan" (1986), 8 E. & T. Q. 130.

Flannigan, "Beneficiary Liability in Business Trusts" (1984), 6 E. & T. Q. 278.

Flannigan, "The Control Test of Principal Status Applied to Business Trusts" (1986), 8 E. & T. Q. 37.

McGregor on Damages (15th ed., 1988), para. 34.

Restatement of the Law — Agency (2d), ss. 15 and 26.

Scott, The Law of Trusts (4th ed., 1987), pp. 88, 95, 519-21.

Waters, The Law of Trusts in Canada (2nd ed., 1984) p. 1107.

APPEAL from judgment, reported at (1986), 21 C.L.R. 240 (Ont. Dist. Ct.), for damages for breach of contract.

The judgment of the Court was delivered by *Morden J.A.*:

1 The defendant Danand Investments Limited and six other defendants appeal from a judgment in favour of the plaintiff Trident Holdings Ltd. for $162,095.17 ($123,934 and prejudgment interest of $38,161.17).

2 In general terms, the learned trial Judge, whose reasons are reported at (1987), 21 C.L.R. 240 (Ont. Dist. Ct.), held that the six other defendants who are appealing were liable to Trident as Danand's principals for breach of a written contract made on February 18, 1982 under which Trident was to supply and instal electrical fixtures, equipment and material for an apartment building to be built on Jarvis Street in Toronto. He also ordered that the judgment was to be enforceable by writ of seizure and sale directed against any remaining registered interest of Danand in the lands in question in this action.

3 The appellants' submissions on the hearing of the appeal were reduced to the following:

4 1. The contract found by the trial Judge was for $922,000. This contract was, however, conditional upon the satisfaction of three conditions and none of them was satisfied. Accordingly, there was no contract in existence at the time of the alleged repudiation by Danand.

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5 2. The terms of the standard form contract always used by Mr. Greenspoon, Danand's representative, which the trial Judge should have found to be part of the agreement between the parties, enabled Danand to repudiate the contract in the circumstances of this case. These particular circumstances involved a material change in the design of the proposed building.

6 3. The trial Judge erred in holding that on the contract in question in this proceeding, which Danand made with Trident, the six defendants other than Danand who are appealing (Zascorp Inc., Hawkdown Investments Ltd., Burnbridge Investments Limited, Pennymoor Investments Limited, Lanark Sheet Metal Works Limited and Thorndon Investments Limited), who are the beneficiaries of a trust of which Danand was the trustee, could be liable as principals.

7 4. The trial Judge erred in ordering that the judgment shall be enforceable by writ of seizure and sale directed against any remaining registered interest of the defendant Danand in the lands in question.

8 5. The trial Judge erred in his calculation of damages.

9 I shall now deal with these submissions.

(1) Was there a contract for $922,000 which was subject to conditions which have not been satisfied?

10 The contract which the trial Judge found to have been made was signed or, at least, initialed by Ray Di Battista on behalf of Trident and by Mel Greenspoon on behalf of Danand at Mr. Greenspoon's office on February 18, 1982. It is a three-page document, the first page being on a Trident proposal form.

11 The essential facts preceding the meeting on February 18 are set forth in the trial Judge's reasons and I shall not repeat them. I do, however, note that Trident's first proposed contract price, based on the plans and specifications which had been furnished to it by Danand, was $997,000. Mr. Di Battista gave this figure to Mr. Greenspoon on the telephone. In further discussions on the telephone this amount was negotiated downward to $955,000. (In making this finding the trial Judge obviously accepted the evidence of Mr. Di Battista over that of Mr. Greenspoon, who denied that any negotiation took place on the telephone before the meeting. At first, Mr. Greenspoon testified that he could not recall negotiations on the telephone; then he testified "that [the negotiations of the $955,000 price on the telephone] is not how it happened.") During the February 18 meeting certain changes and additions were made to the proposal. One of them was the reduction of the price of $955,000 to $952,000, with the result that the relevant provision, with the changes duly initialed, read:

> All of the above work to be completed in a good and workmanlike manner for the sum of Nine hundred fifty-two thousand ($952,000.00) Dollars.

12 The third page contained the following provision, labelled "ALTERNATE":

> Trident Electric can reduce the quoted price by $30,000.00 with design change, reduction in ampacity sizes and omissions of electrical equipment not required. All proposed changes are to be made by Danand's engineers at no charge to Trident Electric. Permission for changes shall be that of the Provincial Inspection Dept., and the local authorities having jurisdiction.

13 The appellants submit that the trial Judge found that the parties had entered into a contract that was subject to the fulfilling of the conditions which were reflected in the provision in the "ALTERNATE" which I have quoted above. The full terms of the conditions were that: (a) Danand's consulting engineers who had drawn the original plans and specifications, would approve the proposed design and other changes; (b) Ontario Hydro would approve the changes; and (c) Danand would agree with the changes. If these requirements were satisfied, there would be a binding contract for $922,000. If they were not satisfied, there was no contract. The evidence shows they were not satisfied; accordingly, the trial Judge erred in finding that the appellants were contractually bound to Trident.

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14 On the other hand, Trident submits that the trial Judge found that the parties entered into a contract for $952,000 (which was Trident's position throughout) and that the "ALTERNATE" provision respecting the $30,000 reduction in the contract price was not a condition of the contract but an optional provision which, if its terms were met, would reduce the contract price.

15 The first step in the resolution of this issue, framed by the parties, requires an interpretation of the trial Judge's reasons in the context of the evidence before him and the parties' submissions respecting the effect of this evidence.

16 The appellants place substantial reliance upon two references to Mr. Greenspoon's evidence in the trial Judge's reasons. They are:

17 (1) In considering the issue (raised at trial but not on this appeal) whether the "agreement" arrived at on February 18 was subject to the signing of a contract in the usual form used by Mr. Greenspoon, the trial Judge said at p. 244:

> Greenspoon added [in his handwritten draft of the contract] a term that 'if savings accrue by recommendations made by this contractor than (sic) 50 per cent of those savings revert back to Danand Investments.' This refers to savings that would reduce the price below $922,000. This was more advantageous to Danand than what had been discussed.

(2) After stating his finding that "[t]he proposal, in the form in which it emerged from the February 18 meeting, itself embodied a complete contract" and describing, generally, its contents, the trial Judge said: "Greenspoon acknowledges that he regarded the meeting as having produced a contract for $922,000 — that is, $952,000 minus cost savings of $30,000."

18 The trial Judge also referred to Mr. Greenspoon's evidence that the price agreed upon was $922,000.

19 The appellants, in addition, submit that the damages awarded were based upon a contract for $922,000, not $952,000.

20 The factual issue on the evidence before the trial Judge was relatively straightforward. Trident's evidence was that there was a contract for $952,000 with an option to do the work for $30,000 less if a further agreement could be reached respecting the changes in the work. I have said "relatively" straightforward because it appears that the appellants' position was more complicated than Trident's. The appellants advanced several obstacles in the way of the formation of a binding contract. Their basic position was that there was no consensus ad idem at all (this was one of the grounds raised in the appellants' factum on appeal but was abandoned before the argument of the appeal) — but they also submitted that if there were to be a contract it would be for $922,000. It may be noted that the defendants had pleaded that they had not entered into any contract but, in the alternative, if a contract were to be found, then the damages claimed were excessive. There is no suggestion in the statement of defence of a conditional contract for $922,000.

21 It was submitted during the trial that credibility was an important issue.

22 No doubt it would have been more helpful if the trial Judge had been more explicit in his findings in resolving the issues before him. Some of the statements in his reasons, standing alone, lend support to the appellants' arguments, but, on all the material before us, I think that he found that the contract was in accordance with the evidence given by Mr. Di Battista.

23 The terms of the proposal itself, "which embodied the complete contract," strongly support this conclusion. Mr. Greenspoon negotiated the price down to $952,000 from $955,000 (having earlier negotiated it down from $997,000) and the "ALTERNATE" is not expressed in the terms of a condition which made the whole arrangement one for a future possible contract for $922,000. Mr. Greenspoon in his evidence, in effect, acknowledged this. He said that the use of the term "ALTERNATE" was "wrong" and "misleading" since it was, he testified, a condition that was intended. Accordingly, there was no reason why his view of the matter, which he expressed at trial, would have been shared by Mr. Di Battista.

24 Insofar as the matter turned on credibility it may be noted that the trial Judge on at least two disputed points (the pre-February 18 negotiation of the price down from $997,000 and how the words "contract to follow" were placed on Mr. Greenspoon's copy of the proposal) preferred Mr. Di Battista's evidence to that of Mr. Greenspoon. Further, he said at p. 250: "I bear in mind that Di Battista obviously gives his evidence as a witness with an interest, but I found his testimony here

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[on an issue relating to the damages], as throughout the trial, to have been given in a frank, conscientious and convincing manner." Accordingly, it is unlikely that the trial Judge rejected Mr. Di Battista's evidence on this most basic issue.

25 With respect to the trial Judge's reference to Mr. Greenspoon's evidence that the contract was for $922,000, I think that the trial Judge was referring to Mr. Greenspoon's position and was not adopting it as his ultimate finding. It was relevant to Mr. Greenspoon's position that there was no contract at all — the position that the trial Judge rejected.

26 Further, I do not think that the trial Judge calculated the damages on the basis that the parties had agreed to a conditional $922,000 contract. Following the approach advanced by Trident, but making some adjustments, he calculated the damages at $95,000, based on a contract price of $952,000. He then added $27,000 "by way of lost profit on the Addendum No. 1 design changes." Addendum No. 1 reflects some, only, of the design changes proposed by Trident and accepted by Danand's consulting engineer, as well as other changes introduced by the engineer which had not been proposed or agreed to by Trident. I interpret this part of the reasons as accepting that Trident and Danand had in fact made the further agreement provided for in the "ALTERNATE". This is consistent with an earlier observation in his reasons at p. 245: "These savings [of $30,000] were in fact produced in the form of design changes suggested by Trident and approved by the job engineers, Intersign, set out in Addendum Number 1 by Intersign (ex. 26)."

27 Given the conclusion that the trial Judge found in favour of Trident that the contract was for $952,000, with the alternative option of being performed for $922,000, the next issue is whether the alternative option requirements were met. The trial Judge was of the view that they were. With respect, I am satisfied that the evidence falls substantially short of supporting such a conclusion. Clearly, the parties had not agreed that Addendum No. 1, issued by Danand's consulting engineers, represented satisfaction of the "ALTERNATE" 's terms. It represented only some of the changes proposed by Mr. Di Battista. He thought that the engineers should have approved more changes, in which case Trident could have achieved even more substantial cost savings than $57,000 relating to Addendum No. 1. Further, some of the changes that were made by the engineer were extras that added to the cost of the work. Mr. Di Battista testified that he would not have done the work, on the basis of the Addendum No. 1 changes, for $922,000. He would have required a larger amount. Just as clearly, Mr. Greenspoon did not agree to the work being done on the basis of Addendum No. 1 for $922,000.

28 On the basis of the foregoing it is clear that the terms of the "ALTERNATE" were not met, and it is not necessary to consider all of the other evidence on this issue. Further, I think there was a reasonable time within which its terms could have been satisfied, if they were going to be, before the basic contract was repudiated by Danand in May or June 1982.

29 In the result, there was no contractual foundation to support the award of the additional $27,000 to Trident. One of the alternate forms of relief sought by the appellants in their notice of appeal and in their factum is that the damages with respect to the "ALTERNATE" in the amount of $27,000 be disallowed. This relief, in my view, should be granted.

(2) Should the trial Judge have found, by implication, that the contract contained a provision in Schedule B of Mr. Greenspoon's standard form of contract that the contract became null and void upon Danand's deciding to make a material change in the plans?

30 I agree with the trial Judge's reasons on this issue. The contract that the parties signed was found by the trial Judge to embody a complete contract. If Danand wished to have all of the special terms of its standard form contract incorporated into the contractual relationship (some of them, such as the one under consideration, being very disadvantageous to the party contracting with one of Mr. Greenspoon's companies), it should have seen to it that this form was signed. Until this was done, there was a complete contract with no need to import any additional terms and I do not think that there was any reasonable basis for doing so. The evidence which could be brought to bear on the matter of implication, such as that which was submitted to relate to the previous courses of dealing, is not sufficiently cogent. Further, the fact that Mr. Di Battista would probably have signed the standard form contract is not sufficient to import the term in question into the contract that in fact was made. Mr. Di Battista gave evidence that he was ignorant of the term.

31 Moreover, it may be noted that in their statement of defence the appellants pleaded "[i]n the alternative, if there is found to be a contract between the parties as alleged in para. 4 of the statement of claim [the allegation of the contract for $952,000]," that Trident had failed to mitigate its loss and that the damages were excessive. They did not plead with respect to this alternative position, which assumes that there was a contract, that the term in question entitled them to repudiate it.

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This, I think, was required by r. 25.07(4) which provides that "[i]n a defence, a party shall plead any matter on which the party intends to rely to defeat the claim of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise or raise an issue that has not been raised in the opposite party's pleading."

(3) Was the trial Judge right in holding that the six defendants who were the beneficiaries of a trust of which Danand was the trustee were liable on the contract?

32 The appellants submit that the trial Judge erred in granting judgment against the defendants Zascorp Inc., Hawkdown Investments Ltd., Burnbridge Investments Limited, Pennymoor Investments Limited, Lanark Sheet Metal Works Limited and Thorndon Investments Limited, hereinafter referred to, for convenience, as "the beneficiaries." The appellants submit that there was no privity of contract between Trident and the beneficiaries and that, because the relationship between Danand and the beneficiaries was that of trustee and beneficiary, no personal liability can be attributed to them on the contract between Trident and Danand. Specifically, the appellants submit that there was no agency relationship between Danand and the beneficiaries and that the trial Judge did not find that one existed. They rely, in particular, on the judgment of Mr. Justice Ewaschuk in *Napev Construction Ltd. v. Lebedinsky* (1984), 7 C.L.R. 57 (Ont. H.C.).

33 The respondent submits that the trial Judge properly held the beneficiaries to be liable on the basis that they were principals and Danand was their agent.

34 The trial Judge referred to the beneficiaries as "the principals behind Danand" and so it is fair to conclude that he did find an agency relationship. The question to be resolved is whether he was correct in doing so.

35 Before relating the particular facts in this case which bear on the question, it will be helpful first to consider a basic analysis of the relevant legal terrain. I set forth the following passages from *Scott, The Law of Trusts* (4th ed., 1987):

> An agent acts for, and on behalf of, his principal and subject to his control; a trustee as such is not subject to the control of his beneficiary, although he is under a duty to deal with the trust property for the latter's benefit in accordance with the terms of the trust, and can be compelled by the beneficiary to perform this duty. The agent owes a duty of obedience to his principal; a trustee is under a duty to conform to the terms of the trust. (Vol. 1, p. 88)
>
> . . . . .
>
> A person may be both agent of and trustee for another. If he undertakes to act on behalf of the other and subject to his control he is an agent; but if he is vested with the title to property that he holds for his principal, he is also a trustee. In such a case, however, it is the agency relation that predominates, and the principles of agency, rather than the principles of trust, are applicable. (Vol. 1, p. 95)
>
> . . . . .
>
> The beneficiaries of a trust are not subject to personal liability to third persons on obligations incurred by the trustee in the administration of the trust.
>
> The situation in the case of a trust is very different from that which arises in the case of an agency. An agent, acting within the scope of his employment, can subject his principal to personal liability in contract and in tort. A trustee is in an entirely different position. He is not empowered to act on behalf of the beneficiaries personally, and does not act subject to their control. His position is one of greater independence. His duty is to administer the trust property in accordance with the terms of the trust. He may have power to subject the trust property to the claims of third persons, but he is not an agent of the beneficiaries and has no power to subject them to such claims ... (Vol. IIIA, pp. 519-20)
>
> . . . . .
>
> It is true, however, that a trustee may be an agent as well as a trustee. Where he is a trustee because he holds the legal title to the trust property, but where in addition he has undertaken to act for the beneficiaries and under their control, he is also their agent, and as such can subject them to personal liabilities by acts done by him within the scope of the employment. Where the trustees are also agents of the beneficiaries, the beneficiaries are personally liable upon contracts made by the trustees in the administration of the trust, unless it is otherwise provided in the contracts. So also

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> the beneficiaries are liable to third persons for torts committed by the trustees in the administration of the trust if they are also agents of the beneficiaries.
>
> . . . . .
>
> Where a business trust is created, that is a trust for the carrying on of a business in which the interests of the beneficiaries are represented by transferable certificates, the beneficiaries may become personally liable upon obligations to third persons incurred by the trustees in the administration of the trust. By the weight of authority it is held that the beneficiaries are not personally liable if the trustees are merely trustees. But where the beneficiaries have power to control the conduct of the trustees to such an extent that the trustees are their agents, the beneficiaries are personally liable as principals. ... It is not always easy to draw the line between trust and agency in such cases, since the difference is one of degree. Where there is sufficient power of control over the trustees so that there is an agency relationship and not merely a trust, the beneficiaries are liable as partners in the carrying on of the business.

(Vol. IIIA, pp. 520-21)

36 The question of the circumstances in which persons who are beneficiaries can be personally liable on contracts made by the trustee has been extensively canvassed in recent periodical literature in this country. I refer to Flannigan, "Beneficiary Liability in Business Trusts", 6 E. & T. Q. 278 (1984); Cullity, "Liability of Beneficiaries — A Rejoinder", 7 E. & T. Q. 35 (1985); Flannigan, "The Control Test of Principal Status Applied to Business Trusts", 8 E. & T. Q. 37 (1986); and Cullity, "Liability of Beneficiaries — A Further Rejoinder to Mr. Flannigan", 8 E. & T. Q. 130 (1986). Notwithstanding their disagreement with respect to many of the circumstances in which beneficiaries may be liable, Mr. Flannigan and Mr. Cullity do agree that if the trustee is a bare trustee the beneficiaries may be liable on contracts made by the trustee. On this point I quote the following from Mr. Cullity's article in 7 E. & T. Q. 35 (1985) at p. 36:

> It is quite clear that in many situations trustees will also be agents. This occurs, for example, in the familiar case of investments held by an investment dealer as nominee or in the case of land held by a nominee corporation. In such cases, the trust relationship that arises by virtue of the separation of legal and equitable ownership is often described as a bare trust and for tax and some other purposes it is quite understandably ignored.
>
> The distinguishing characteristic of the bare trust is that the trustee has no independent powers, discretions or responsibilities. His only responsibility is to carry out the instructions of his principals — the beneficiaries. If he does not have to accept instructions, if he has any significant independent powers or responsibilities, he is not a bare trustee.

37 The underlying reason why a trustee, who is acting as a trustee in the circumstances, cannot subject the beneficiaries to liability is indicated in the passages I have quoted. The trustee is not acting under a duty of obedience to the beneficiaries but, rather, under a duty to carry out the terms of the trust. Professor Waters, *The Law of Trusts in Canada* (2nd ed., 1984), p. 1107, has succinctly put the matter this way:

> It is because common law trustees (he is comparing the trust with certain civil law institutions) contract in furtherance of their 'ownership' rights to manage and dispose, that the third party can only look to the trustees for damage for breach of such a contract.

38 Before returning to the law, I shall deal with the relevant facts. The land involved in this action is registered in the name of Danand Investments Limited, Trustee. The trust terms in question were established by an agreement dated February 5, 1982 between the six beneficiaries and Danand. The recitals in it read:

> WHEREAS Danand is the registered owner of certain lands in the City of Toronto, in the Municipality of Metropolitan Toronto, in the Province of Ontario, which lands are more particularly described in Schedule "A" annexed hereto.
>
> AND WHEREAS Danand owns the aforesaid lands as bare nominee and trustee for and on behalf of Zascorp, the H.T.L. Group [which comprised Hawkdown Investments Ltd., Thorndon Investments Limited and Lanark Sheet Metal

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Works Limited], Burnbridge and Pennymoor, in the proportions hereinafter set out.

AND WHEREAS Zascorp, the H.T.L. Group, Burnbridge, and Pennymoor are entering into this agreement for the purpose of setting forth their relationship inter se.

AND WHEREAS Danand is executing this agreement for the purpose of consenting to and agreeing to be bound by the provisions set out herein;

39 It is fair to say that the main purpose of the agreement is to establish, in detail, the rights and obligations of the parties to it with respect to the development of the land on Jarvis Street. Consistently with the description of Danand in the recitals as "bare nominee and trustee," the agreement confers no powers or discretions on it. Implicit, if not explicit, in the agreement is that Danand's function is to hold the legal title to the land and to do the bidding of the beneficiaries. This is confirmed by the evidence at trial. For example, Mr. Greenspoon, in his examination for discovery, which became part of the trial record, answered questions relating to Danand as follows:

Q. What was the role played by Danand Investments Limited in the joint venture arrangement?

A. It was the trustee for all the corporations.

Q. What did that mean to you?

A. *It was the name we used to do things in.*

Q. There was no other role other than that?

A. Not to my knowledge.

(emphasis added)

40 There are other passages in Mr. Greenspoon's evidence to the same effect. Mr. Di Battista had testified that he had been told, presumably by Mr. Greenspoon, that "the owners of this project" were five named individuals, including Mr. Greenspoon. (They were the principals behind the beneficiaries.) In answer to a question whether it was "possible that you may have mentioned who your partners were in this deal?" Mr. Greenspoon replied: "I may have, yes." He also testified as follows in cross-examination:

MR. MALEN: Q. Now, you were — Mr. Greenspoon, you were the person who was in charge of the contracting with the subtrades. Is that right?

A. That's correct.

Q. And who did you understand that you were contracting on behalf of?

A. The joint —

Q. Who were you acting for?

A. The joint venture partners in Danand.

Q. The joint venture partners and Danand. And it was the joint venture partners, then, that were going to build this apartment building? Correct?

A. Yes.

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41 The agreement contains the following, in para. 6.04(c):

> 6.04 Notwithstanding the provisions of Sections 6.02 and 6.03 [which are concerned with certain powers of an executive committee to conduct the affairs of the beneficiaries, who are described as "co-owners"] of this agreement, all documents intended to be binding upon the co-owners shall be executed in the following manner:
>
> . . . . .
>
> (c) Either of Mel Greenspoon or Andy Senyi may execute sub-contracting agreements in connection with the construction of buildings upon the Real Property.

42 I quote this provision because it refers to the kind of contract we have in this case. At least one of the effects of the provision surely is that it shows that the beneficiaries contemplated being liable on contracts relating to the construction of buildings on the property.

43 On these facts and in the light of the preceding legal analysis, it is clear that, as far as the contract with Trident is concerned, Danand was not exercising any power or discretion conferred on it by the trust agreement, or ownership rights (although, of course, it was important that it held the legal title to the property benefited by the contract) but, rather, was carrying out the mandate of the beneficiaries. In the words of Scott (p. 95), the agency relationship predominated over the trust relationship.

44 Before concluding on this issue I should mention decisions or dicta which may be argued to support the view that even a bare trusteeship insulates the beneficiaries from liability on contracts made by the trustee. Reference may be made to *Parkview Towers of Hamilton Ltd. v. Cdn. Imperial Bank of Commerce* (1980), 30 O.R. (2d) 294, 17 R.P.R. 291, 9 E.T.R. 113, 118 D.L.R. (3d) 384 (Ont. H.C.), result affirmed (1981), 31 O.R. (2d) 233 (Ont. C.A.); *Prince v. Gundy*, [1936] O.W.N. 397 at 401; *Mills v. Tibbetts* (1916), 11 O.W.N. 251 at 252; and *Creasor v. Wall* (1983), 38 O.R. (2d) 35 at 46, 25 R.P.R. 1 (Ont. H.C.), reversed on other grounds (1983), 40 O.R. (2d) 644, 27 R.P.R. 8 (Ont. C.A.). I do not intend to discuss these cases in any detail. In the articles to which I have referred, neither Mr. Flannigan nor Mr. Cullity (who takes a less expansive view of the liability of beneficiaries than does Mr. Flannigan) thinks that they necessarily stand for the proposition that agency relationships will not exist in cases of bare trusts. I refer, in particular, to Mr. Cullity's statement in his article in 7 E. & T. Q. 35 (1985) at p. 48:

> If the suggested explanation of the above dicta and the decisions that have held beneficiaries of bare trusts to be immune from liability is correct, those cases are not authority that an agency relationship will not exist in cases of bare trusts.

Mr. Flannigan deals with these cases at pp. 97-98 of 8 E. & T. Q. 37 (1986).

45 The feature of these decisions which I would stress for present purposes is that in none of them did the Court address, and then reject, the basic analysis in Scott, The Law of Trusts, which indicates that in some cases it may not be the trust relationship which is at work but, rather, an agency relationship. They all, at least as the basis of one ground of the decision, simply applied the general proposition that a trustee cannot bind the beneficiaries of a trust. I do not regard them as authority prohibiting resort to the proper application of Scott's analysis.

46 I should say more than this about *Parkview Towers* and about the *Napev Construction* decision, upon which the appellants particularly rely.

47 In *Parkview Towers* the trust agreement provided that the trustee held the property "as bare trustee for the benefit of the owners in accordance with their shareholdings in the trustee" (taken from 30 O.R. (2d) 294 at p. 296 — not a direct quotation from the agreement) and that "[t]he Trustee shall not deal with the Building in any manner except a manner in accordance with the instructions of a majority in interest of the Owners." Van Camp J. (at p. 298) applied, as one of the grounds of her decision, the proposition that "no beneficial owner ... can be held liable under a contract entered into for his benefit by his trustee" (*Prince v. Gundy*, supra, [p. 401 O.W.N.]). As indicated earlier, the significance of the fact that the

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trustee was a bare trustee was not addressed.

48 An appeal from Van Camp J.'s judgment was dismissed by this Court. However, it appears clear from the notice of appeal and the appellant's factum that the only issue presented to this Court related to the possible liability of the beneficiaries under s. 19(2) of the *Mortgages Act*, R.S.O. 1970, c. 279 and not their contractual liability.

49 In *Napev Construction Ltd. v. Lebedinsky*, supra, the trustee was designated a bare trustee in a situation apparently similar to that in the present case. Ewaschuk J. dismissed the plaintiff's action against the beneficiaries on more than one basis. At p. 63 he said:

> There is, however, a clear exception to the privity rule in agency relationships. Where a contracting party is an agent for a principal not a party to a contract, the principal may directly sue or be sued. The reason is that the agent is the mere conduit for the principal and for that reason, the contract is that of the principal and not the agent. *Was there an agency agreement here between the contracting numbered company and the defendants? I think not. To create an agency relationship requires an agency contract between principal and agent. Here, I find no such contract.* Instead I find only a trust relationship although I assume in certain circumstances the two relationships may indeed coincide or overlap.

(emphasis added)

50 The appellants in this case place emphasis on the words in this passage which I have italicized. If this passage is read as requiring the existence of a formal express agency agreement before there can be an agency relationship then, with respect, I must disagree. It is clear that an agency agreement may be implied from circumstances of the case: see *Bowstead on Agency* (15th ed. 1985), p. 42; *Restatement of the Law — Agency* (2d), ss. 15 and 26; and *Garnac Grain Co. v. H.M.F. Faure & Fairclough Ltd.*, [1968] A.C. 1130 at 1137. It is not necessary to comment further on *Napev Construction*.

51 Having regard to the foregoing, I think that the trial Judge was correct in concluding that the beneficiaries were liable on the agreement.

(4) Was the trial Judge right in ordering that the judgment shall be enforceable by writ of seizure and sale directed against any remaining registered interest of the defendant Danand in the lands in question?

52 The trial Judge granted judgment against the beneficiaries and not against Danand. However, he did order that the judgment should be enforceable by writ of seizure and sale against any interest in the subject lands which may remain in the title of Danand. This is reflected in para. 3 of the formal judgment.

53 Mr. Malen informed us that he had submitted to the trial Judge, on behalf of Trident, that whether the agent, Danand, could be liable together with its principals was a matter of the interpretation of the documents in all of the circumstances. He cited *Dolly Varden Mines Ltd. (N.P.L.) v. Sunshine Exploration Ltd.* (1967), 64 D.L.R. (2d) 283 (B.C. S.C.), varied (1968), 69 D.L.R. (2d) 209 (B.C. C.A.), which was affirmed, [1970] S.C.R. 2, 70 W.W.R. 418, 8 D.L.R. (3d) 441 (S.C.C.), in support of this submission. I think there are clear distinguishing features between this case and *Dolly Varden Mines*, but I need not pursue this question because the trial Judge, in not granting judgment for recovery of the damages against Danand, appears to have rejected Trident's submissions and there is no cross-appeal from this disposition. Mr. Malen had submitted to the trial Judge that if Trident was put to its election it would take the judgment against the beneficiaries and not Danand.

54 The reasoning behind the order in para. 3 was not explained to us and, since no order for the payment of money was made in favour of Trident against Danand, I do not think it should have been made. In my view, para. 3 should be deleted from the judgment.

(5) Did the trial Judge err in his calculation of damages?

55 The appellants submit that the damages should be reduced by $5,000. The $5,000 sought to be deducted is the total amount of two Intron Engineering Corporation Ltd. invoices to Trident for work done on the design changes to effect the

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reduction in the contract price pursuant to the terms of the "ALTERNATE". These invoices have not been paid. There was in evidence a letter from Intron to Trident which said: "As agreed with you, due to the fact that the job is not progressing at present, we do not expect payment of the amounts owing to us unless you proceed with the work." Mr. Di Battista testified that "that does not mean that I'm not going to be paying the invoice."

56 This $5,000 expense was not part of the cost-breakdown put forward in support of Trident's claim for damages and the appellants submit that it represents an additional cost which should be deducted from the profit awarded.

57 The trial Judge disposed of this issue by holding that the matter was between Trident and Intron and had no bearing on the subject of damages and refused to make the deduction.

58 I agree with the trial Judge's conclusion for two reasons. First, damages representing loss of profit which would have been earned but for the defendants' breach must be reduced by the cost the plaintiff would necessarily have incurred in earning the profit. If they are not so reduced then the damages represent a windfall to the plaintiff because the plaintiff has been relieved from incurring the expense. See *McGregor on Damages* (15th ed., 1988), para. 34. That is not the case here. It is not clear that Trident is freed from the obligation to pay Intron the $5,000, and there is no basis for saying that the breach freed it from incurring the obligation so that it should be taken into account in calculating the damages.

59 Second, the $5,000 expense, whether or not paid, is not a cost related to the particular loss of profit to which I have found Trident entitled — the profit on the $952,000 contract. This expense was potentially related to the making of the contract reflecting the $30,000 reduction. I have concluded that since this contract was not made Trident is not entitled to any damages relating to it. For this reason also, this amount should not be deducted from the damages.

60 In the result I would allow the appeal, in part, and vary the judgment by reducing the $123,934 recovery provided for in para. 1 by $27,000 to $96,934 and making the necessary recalculations of prejudgment interest. I would also delete para. 3 from the judgment. In view of the divided success on the appeal, I would make no order with respect to the costs of the appeal.

Appeal allowed in part.

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Tab D

642947 Ontario Limited v. Fleischer et al.

Fleischer et al. v. 642947 Ontario Limited et al.; Sweet Dreams Delights Inc. et al., Third Parties

[Indexed as: 642947 Ontario Ltd. v. Fleischer]

56 O.R. (3d) 417
[2001] O.J. No. 4771
Docket Nos. C27257 and C27338

Court of Appeal for Ontario,
Abella, Laskin and Rosenberg JJ.A.
December 7, 2001

Corporations -- Piercing the corporate veil -- Corporation having right of first refusal to purchase land -- Corporation suing to enjoin sale of land to third party purchaser -- Corporation giving undertaking as to damages -- Corporation failing to disclose that it did not have assets to honour undertaking as to damages -- Shareholder alter ego for corporation -- Shareholder personally liable for corporation's undertaking as to damages.

Injunctions -- Interlocutory injunction -- Undertaking as to damages -- Party giving undertaking as to damages obliged to disclose whether its assets are adequate to honour undertaking.

Injunctions -- Interlocutory injunction -- Undertaking as to damages -- Corporation having right of first refusal to purchase land -- Corporation suing to enjoin sale to third party purchaser -- Corporation giving undertaking as to damages -- Third party purchaser enjoined on terms that closing of its agreement be extended until resolution of claim by corporation to enforce right of first refusal -- Corporation abandoning action and injunction dissolved -- Third party purchaser

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refusing to complete its purchase and found liable to vendor for damages for breach of contract -- Corporation not liable under its undertaking as to damages to indemnify third party purchaser for damages it had to pay vendor -- Granting of injunction not causing damages suffered by third party purchaser.

Sale of land -- Breach of contract -- Damages -- Date of assessment -- Corporation having right of first refusal to purchase land -- Corporation suing to enjoin sale to third party purchaser -- Third party enjoined on terms that closing of its agreement be extended until resolution of claim by corporation to enforce right of first refusal -- Corporation abandoning action and injunction dissolved -- Market values for land having declined and third party refusing to complete its purchase -- Third party liable to vendor for damages for breach of contract -- Vendor retaining property in anticipation that value would return -- Damages to be assessed as at around time of failure to close.

F and N owned a property that they leased to S Inc., which was owned by H and K. The lease had a right of first refusal. In August 1989, 642947 Ontario Ltd. ("642947"), a nominee of B Corp. under a bare trust that required 642947 to act on the instructions of B Corp., offered to purchase the property. This offer triggered the right of first refusal, but S Inc. did not complete a purchase and, in September 1989, 642947 resubmitted its offer, which was to buy the property for $2 million. F and N accepted the resubmitted offer and took the position that the right of first refusal had been extinguished. S Inc., however, took the position that the right remained available.

S Inc. sued, and it moved for an interlocutory injunction to restrain the sale to 642947. In the motion for the injunction, B Corp., which previously had been an undisclosed principal, filed an affidavit stating it would suffer great harm if the injunction were granted. Isaac J. granted the injunction on terms, which were requested by 642947 and B Corp., that the closing of the sale to 642947 be extended. S Inc. gave an undertaking to pay any damages caused by the injunction in the language prescribed by rule 40.03 of the Rules of Civil

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Procedure.

In 1990, the real estate market collapsed, and S Inc. abandoned its action. The injunction was dissolved, and December 7, 1990 was set for the closing of the sale to 642947, but it now refused to close because of the effect of the injunction and the market downturn. It sued for its deposit. F and N counterclaimed. The counterclaim was against 642947 and B Corp., which brought a third party claim against S Inc., H and K.

The trial was heard in July of 1995 and 1996 and, at the time of the trial, F and N still owned the property, which was still leased but not to S Inc. Greer J. held that 642947 was the agent of B Corp. and that it and B Corp. were liable for breach of contract or for inducing breach of contract. She held that the deposit was forfeit and damages were to be assessed as at December 7, 1990, when the property was worth $1,130,000, yielding a judgment of $870,000 (the difference between the purchase price and the value of the property) plus pre-judgment interest as provided by the Courts of Justice Act, R.S.O. 1990, c. C.43. She held that the right of first refusal had been extinguished and S Inc. was liable to indemnify 642947 and B Corp. under the undertaking as to damages. Greer J., piercing the corporate veil, held that H and K were jointly and severally liable because they were the alter ego of S Inc. and had defrauded the court by offering the undertaking when they knew that S Inc. had no assets to satisfy it. All parties appealed.

The following were the grounds for the appeal by 642947 and B Corp.: (1) B Corp. as an undisclosed principal was entitled to rely on the sealed contract rule; (2) F and N were precluded from suing B Corp., having elected to contract with 642947; (3) 642947 and B Corp. were not liable because F and N acted in bad faith; and (4) 642947 and B Corp. were not liable because F and N could not give vacant possession on closing. On their appeal, F and N contended that they had not been fully compensated for their loss and that damages should have been assessed at or near the date of the trial. (The evidence was that the value of the land had declined to only $410,000 as of November 1994.)

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They also contended that pre-judgment and post-judgment interest should have been awarded at commercial rates of interest. On their appeal, S Inc., H and K submitted that S Inc. was not liable to indemnify 642947 and B Corp. under the undertaking as to damages because the injunction had not caused damages to them and that even if S Inc. was liable, there were no grounds to pierce the corporate veil.

Held, The appeals of F and N, and 642947 and B Corp. should be dismissed; the appeal of S Inc., H and K should be allowed.

There was no merit to any of the grounds of appeal advanced by 642947 and B Corp., and their appeal should be dismissed. The subject of the litigation was not a contract under seal and, therefore, the sealed contract rule, which holds that where a contract is made under seal, only the parties to the contract may sue or be sued on it, did not apply. There was no merit to the arguments that effect should be given to 642947's intention to execute the offer under seal and that the Land Registration Reform Act, R.S.O. 1990, c. L.4 made the contract under seal. Further, there was no bad faith and no basis to preclude F and N from suing B Corp. as the principal of the contract negotiated by its agent 642947, and the inability to give vacant possession on closing was never an impediment to closing the transaction.

The appeal of F and N should be dismissed. Greer J. did not err in selecting the date for the assessment of damages or in her award of interest on the judgment. As a general rule, in a falling market, the court should award an innocent vendor damages equal to the difference between the contract price and the highest price obtainable within a reasonable time after the contractual date for completion following the making of reasonable efforts to sell the property commencing on that date. Where, however, the vendor retains the property in order to speculate on the market, damages will be assessed as at the date of closing. In the immediate case, F and N decided to retain the property, speculating that the value would return. They alone had to assume the burden or the benefit of changes in the market after the closing date.

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The appeal of S Inc. should be allowed. It was not liable under its undertaking as to damages. Under its undertaking, which tracked the wording of rule 40.03, S Inc. undertook "to abide by any Order concerning damages that the Court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the applicant ought to compensate it". The trial judge erred by finding a causal connection between the injunction and any damages suffered by 642947 and B Corp. The injunction did not cause or materially contribute to the damages 642947 and B Corp. were obliged to pay F and N. Those damages were caused by the fall in the market and by B Corp.'s refusal to close after having asked the motions judge to extend the closing date to preserve its interest in the property.

Assuming, however, that S. Inc. was liable under the undertaking as to damages, H and K would have been jointly and severally liable. Contrary to their submission, there was ample evidence to support the finding that S Inc. did not have sufficient assets to honour the undertaking. Contrary to their submission, it was not necessary for B Corp. to raise the issue of the adequacy of the assets on the injunction application. S Inc. had the primary obligation to disclose that its assets were inadequate. Its undertaking was to the court. It implicitly represented that it had sufficient assets and both the court and B Corp. were entitled to rely on that representation without making inquiries. After disclosure, it could have asked to be relieved of its undertaking or could have been asked to post security. Finally, contrary to their submissions, the trial judge made no error in piercing the corporate veil. It was open on the evidence to find that H and K were the alter egos of S Inc. and it was appropriate to make them personally liable for trying to use S Inc. as a shield for improper conduct.

Cases referred to

100 Main Street Ltd. v. W.B. Sullivan Construction Ltd. (1978), 20 O.R. (2d) 401, 88 D.L.R. (3d) 1 (C.A.) [leave to appeal to S.C.C. refused (1978), 20 O.R. (2d) 401n, 88 D.L.R.

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(3d) 1n]; Air Express Ltd. v. Ansett Transportation Industries (Operations) Pty Ltd. (1979 to 1981), 146 C.L.R. 249, 33 A.L.R. 578; Bitton v. Jakovljevic (1990), 75 O.R. (2d) 143, 13 R.P.R. (2d) 48 (H.C.J.); Brock v. Cole (1983), 40 O.R. (2d) 97, 142 D.L.R. (3d) 461, 31 C.P.C. 184, 13 E.T.R. 235 (C.A.); Claiborne Industries Ltd. v. National Bank of Canada (1989), 69 O.R. (2d) 65, 34 O.A.C. 241, 59 D.L.R. (4th) 533 (C.A.); Clarkson Co. v. Zhelka, [1967] 2 O.R. 565, 64 D.L.R. (2d) 457 (H.C.J.); Constitution Insurance Co. of Canada v. Kosmopoulos, [1987] 1 S.C.R. 2, 21 O.A.C. 4, 34 D.L.R. (4th) 208, 74 N.R. 360, 36 B.L.R. 233, [1987] I.L.R. 1-2147; F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry, [1975] A.C. 295, [1974] 2 All E.R. 1128, [1974] 3 W.L.R. 104, 118 Sol. Jo. 500 (H.L.); Friedmann Equity Developments Inc. v. Final Note Ltd., [2000] 1 S.C.R. 842, 48 O.R. (3d) 800n, 188 D.L.R. (4th) 269, 255 N.R. 80, 34 R.P.R. (3d) 159, 7 B.L.R. (3d) 153; Rice v. Rawluk (1992), 8 O.R. (3d) 696 (Gen. Div.); Salomon v. Salomon & Co., [1897] A.C. 22, [1895-9] All E.R. Rep. 33, 66 L.J. Ch. 35, 75 L.T. 426, 45 W.R. 193, 13 T.L.R. 46, 41 Sol. Jo. 63, 4 Mans. 89 (H.L.); Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1996), 28 O.R. (3d) 423 (Gen. Div.), affd [1997] O.J. No. 3754 (C.A.); Trident Holdings Ltd. v. Danand Investments Ltd. (1988), 64 O.R. (2d) 65, 25 O.A.C. 37, 49 D.L.R. (4th) 1, 39 B.L.R. 296, 30 E.T.R. 67 (C.A.); Vieweger Construction Co. v. Rush Tompkins Construction Ltd. (1964), [1965] S.C.R. 195, 48 D.L.R. (2d) 509; Village Gate Resorts Ltd. v. Moore (1999), 71 B.C.L.R. (3d) 1, 37 C.P.C. (4th) 5 (C.A.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
Land Registration Reform Act, R.S.O. 1990, c. L.4, s. 13(1)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 40.03

Authorities referred to

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Spry, I.C.F., The Principles of Equitable Remedies, 5th ed. (Toronto: Carswell, 1997)
Waddams, S.M., The Law of Contracts, 4th ed. (Toronto: Canada Law Book, 1999)

APPEAL and CROSS-APPEALS of a judgment of Greer J. (1997), 9 R.P.R. (3d) 261 (Ont. Gen. Div.) (supplementary reasons reported 86 O.T.C. 390) in an action and third party proceeding for damages for breach of contract for the sale of land.

Ronald E. Carr, for 642947 Ontario Limited and Burnac Corporation.
Valerie A. Edwards and Duncan Embury, for Jules Fleischer and Melvin Newton.
Brian Morgan and Monica Creery, for George Halasi.
Robert L. Falby, Q.C., for Sweet Dreams Delights Inc. and Larry Krauss.

The judgment of the court was delivered by

LASKIN J.A.: --

INTRODUCTION

[1] These appeals raise three main questions:

1. On what date should damages for breach of an agreement to buy land be assessed?

2. When should a party who obtains an interlocutory injunction be liable on its undertaking to pay damages?

3. Where the party tendering the undertaking is a corporation, when should the corporation's principals be liable?

[2] The litigation arises out of a fight between two sophisticated developers -- Burnac Corporation and George Halasi -- to acquire a property in North York (the "Property")

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considered key to the development of the North York corridor. The Property was owned by Jules Fleischer and Melvin Newton and leased to Sweet Dreams Delights Inc., a company controlled by Halasi and his partner Larry Krauss, a lawyer. Sweet Dreams' lease contained a right of first refusal on any offer to buy the Property.

[3] In August 1989, 642947 Ontario Limited ("642947"), a nominee of Burnac, agreed to buy the Property for $2,000,000. Sweet Dreams exercised its right of first refusal, but later terminated the agreement. Then, in late September 1989, 642947 resubmitted its original offer to Fleischer and Newton, who accepted it and took the position that Sweet Dreams' right of first refusal was spent. Sweet Dreams, however, obtained an interlocutory injunction restraining the sale. It gave the usual undertaking to pay any damages caused by the injunction. On the injunction application, 642947 and Burnac requested and were granted an extension of the closing date until after the injunction proceedings had concluded. In 1990, the real estate market in Metropolitan Toronto collapsed. The Property fell in value, and both Burnac and Halasi lost interest in it. Sweet Dreams' injunction was dissolved in November 1990 and a new closing date for the sale to 642947 was fixed for December 1990. But 642947 refused to close, citing th e downturn in the real estate market.

[4] 642947 sued for a declaration that its agreement with Fleischer and Newton had been terminated and for a return of its deposit. Fleischer and Newton counterclaimed for damages for breach of the agreement, and 642947 and Burnac sought to be indemnified by Sweet Dreams, Halasi and Krauss on the undertaking to pay damages.

[5] After a long trial heard in July of 1995 and 1996, Greer J. held 642947 and Burnac liable for breach of the agreement of purchase and sale. She assessed damages at the date of closing in December 1990, though the Property fell in value afterwards. She also held that Sweet Dreams' undertaking required it to indemnify 642947 and Burnac for their loss and she found Halasi and Krauss jointly and severally liable on the undertaking because Sweet Dreams had no assets and was simply their alter

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ego.

[6] All parties appealed the trial judgment. Burnac and 642947 raised several technical grounds why they were not liable to Fleischer and Newton. In turn, Fleischer and Newton contended that the trial judge erred in assessing damages at the date of closing instead of at or near the date of trial and, alternatively, that she erred in failing to order pre-judgment interest and post-judgment interest at the commercial rate instead of the statutory rate. Sweet Dreams, Halasi and Krauss submitted that they were not liable on the undertaking because 642947 and Burnac's damages were not caused by the injunction. Finally, Halasi and Krauss submitted that even if Sweet Dreams was liable on the undertaking, the trial judge erred by piercing the corporate veil and making them liable as well.

[7] We found no merit in the appeal by 642947 and Burnac and did not call on Fleischer and Newton to respond to it. I would dismiss the appeal by Fleischer and Newton on damages. I would, however, allow the appeal by Sweet Dreams, Halasi and Krauss because, in my view, the damages awarded against 642947 and Burnac were not caused by the injunction but by the fall in the real estate market and by their deliberate refusal to close the transaction. Had I, however, found Sweet Dreams liable on its undertaking, I would have upheld the trial judge's conclusion that Sweet Dreams' principals, Halasi and Krauss, were also liable.

FACTUAL BACKGROUND

A. The Agreements of Purchase and Sale Between 642947 and Fleischer and Newton

[8] The Property that has been the subject of all this litigation is on a municipal block bounded by Yonge Street, Empress Avenue, Doris Avenue and Kingsdale Avenue in the former City of North York. It is next to a block of land owned by the City. Developers interested in assembling land in the North York corridor knew that the City would only sell its block to a party that owned neighbouring land. Therefore, acquiring the

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Property was key to developing the corridor.

[9] The Property was bought by Fleischer, a lawyer and a developer, and Newton in 1985. In 1986 they leased it to Sweet Dreams, a company controlled by Halasi and Krauss, each of whom was a 40 [per cent] shareholder through corporations owned or controlled by them. Sweet Dream's lease was for five years with several renewal options to 2006. The lease also contained a right of first refusal, which provided that if the landlord received a bona fide offer to purchase the property, Sweet Dreams had the right to purchase it on the same terms:

> In the event any Landlord hereunder receives a bona fide offer (the "Offer") to purchase the building and land during the Term or the Renewal Periods from an arm's length third party purchaser as defined under the Income Tax Act, the Landlord shall send a copy of the Offer to the Tenant (the "Notice") and the Tenant shall have a first right of refusal to purchase the building and land at a purchase price and upon terms and conditions equal and similar to those contained in the Offer. Upon receipt of the Notice, the Tenant shall have seven (7) business days to reply to the Landlord in writing of its intent to exercise or not exercise its right of first refusal as the case may be. Should the Tenant elect to exercise its right of first refusal as set out hereunder, there shall be a binding agreement of purchase and sale of the Landlord's freehold estate in the building and the land upon which is situated the Leased Premises between the Landlord and Tenant and the parties agree to execute all additional documen tation to give effect thereto.
> . . .

This right of first refusal gave Sweet Dreams control over the development of the Property.

[10] In the late 1980s, the real estate market in Metropolitan Toronto was booming. Burnac became interested in the Property and used a nominee or shelf company, 642947, to try to buy it. 642947 was a bare trustee under a trust agreement with Burnac dated August 28, 1989. The sole shareholder, director and officer of 642947 was John Handiak, a

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solicitor who had done work for Burnac for about 15 years. 642947, however, had no assets, no employees and no independent authority. Under the trust agreement, 642947 was to act "solely and entirely on the instructions" of Burnac. Burnac's Vice-Chairman Theodore Burnett testified that the company typically used trust agreements to acquire real property in order to hide the identity of the true purchaser and to limit Burnac's liability.

[11] On August 31, 1989, 642947 entered into an agreement with Fleischer and Newton (the "first agreement") to buy the Property for $2,000,000, made up of a $100,000 deposit and the balance due on closing, fixed for November 24, 1989. The agreement was conditional on Sweet Dreams' right of first refusal.

[12] Fleischer and Newton submitted the first agreement to Sweet Dreams and on September 13, 1989, Sweet Dreams exercised its right of first refusal. By doing so, Sweet Dreams took over 642947's position as purchaser. It then turned around and offered to sell the property to 642947 for $2,050,000, an increase of $50,000 over the original purchase price. 642947 declined the offer. Later, Sweet Dreams used an unrelated condition in the first agreement to get out of the deal.

[13] On September 25, 1989, 642947 made an identical offer of $2,000,000 to purchase the Property, which Fleischer and Newton accepted (the "second agreement"). Fleischer and Newton, and Handiak, representing 642947, then signed a waiver notice dispensing with the right of first refusal condition in the second agreement. They took the position that once Sweet Dreams had exercised its right of first refusal in connection with the first agreement that right was extinguished. The trial judge agreed. She found that 642947's first offer was a bona fide offer, and that "once Sweet Dreams exercised its option, even though it then declined to purchase prior to the inspection period being concluded, its right of first refusal was extinguished and it then no longer became necessary for Fleischer and Newton to submit 642[947]'s identical second Offer to Sweet Dreams": (1997), 9 R.P.R. (3d) 261 at p. 292 (Ont. Gen. Div.). In this court, neither Sweet Dreams nor

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its principals Halasi and Krauss challenged thes e findings.

B. The Injunction Proceedings

[14] The second agreement was scheduled to close on Friday, November 24, 1989. In mid-November, Sweet Dreams sought to enjoin the closing on the ground that it had not been given an opportunity to exercise its right of first refusal. The application for the injunction was supported by the affidavit of Halasi, who gave an undertaking on behalf of Sweet Dreams in the standard form prescribed by rule 40.03 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194:

> The Applicant undertakes to abide by any Order concerning damages that the Court may make if it ultimately appears that the granting of the Order has caused damage to the responding party for which the Applicant ought to compensate it.

Acting on Burnett's instructions, Andrew Federer, a lawyer and president of a Burnac subsidiary, filed a responding affidavit stating that Burnac would suffer great harm if the injunction were granted.

[15] The application for the injunction was argued on Thursday, November 23, the day before the scheduled closing date. Both Krauss and Fleischer attended the hearing. Krauss offered to buy the Property for $2,000,000 if the motions judge, Isaac J., restrained 642947 and Fleischer and Newton from closing the second agreement. Fleischer said that he was indifferent and would sell to whichever party the court found was entitled to buy. After a full day of argument, Isaac J. reserved his decision until Monday, November 27. To avoid being prejudiced while the decision was under reserve, 642947 and Burnac asked the motions judge to extend the closing date until Monday, which he did. On Monday the 27th, Isaac J. released his decision, in which he enjoined 642947 and Fleischer and Newton from completing their agreement of purchase and sale until trial or other order of the court. To preserve their interest in the Property while the injunction was outstanding, 642947 and Burnac again asked the motions judge to extend the closing date of the second agreement. In Federer's words, 642947 and

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Burnac were "betting that the market would stay the same or go up". Isaac J. ordered an extension until the disposition of the action or further order of the court.

[16] Before the injunction proceedings, Burnac had been an undisclosed principal but during the injunction it participated openly and actively and thus became a disclosed principal. Burnac was later added as a defendant in the action.

C. Subsequent Events

[17] In 1990, the real estate market in Metropolitan Toronto collapsed. Property values in the North York area fell dramatically, by as much as 50 to 70 per cent. Halasi and Krauss lost interest in buying the property. Therefore, in November 1990, Sweet Dreams moved to discontinue the action. On November 22, 1990, Dunnet J. granted Sweet Dreams leave to discontinue, dissolved the injunction and fixed December 7, 1990 for closing the second agreement. She also ordered that the question whether the undertaking of Sweet Dreams could be imposed on Halasi and Krauss could be considered on an inquiry into damages or in another proceeding.

[18] Burnac, too, lost interest in buying the Property. The day after Dunnet J.'s order, 642947 wrote to Fleischer and Newton waiving tender and stating that it would not close the second agreement because of "the effect of the injunction granted by Mr. Justice Isaac dated November 27, 1989 and the downturn in the real estate market since that date". As Burnett testified at trial, Burnac did not complete the transaction because "I didn't think I was getting what I had bargaining for".

[19] After the injunction was dissolved, Fleischer and Newton let it be known that the Property was back on the market, though they did not list it for sale. When Sweet Dreams' lease expired in 1991, Fleischer and Newton leased the Property to a new tenant, Sonic Temple Music Store. The litigation began in April 1991. When the trial ended in July 1996, Fleischer and Newton still owned the Property and the music store remained a tenant with an option to renew its lease until 2006.

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D. The Reasons of the Trial Judge

[20] The trial judge gave detailed reasons [reported at 9 R.P.R. (3d) 261] in what turned out to be a difficult case. She held that both 642947 and Burnac were liable to Fleischer and Newton for breaching the second agreement. And because it had repudiated the agreement, 642947 was not entitled to the return of its deposit.

[21] The trial judge dismissed the "technical" real property issues raised by 642947 and Burnac -- for example, the inability of the vendors to give vacant possession on closing -- by concluding that these issues did not impede the closing. She found that the trust agreement between 642947 and Burnac applied to the second agreement, that 642947 acted as agent on the transaction, and that, therefore, Burnac was liable as an undisclosed principal. Alternatively, she held that Burnac was liable for inducing breach of contract.

[22] The trial judge then turned to assess Fleischer and Newton's damages. She made findings of fact on the value of the Property and on mitigation, which are not challenged on this appeal. She found that the Property was worth $1,130,000 on the date scheduled for closing, December 7, 1990, and that by November 1994, the last time it was appraised before trial, it had a value of only $410,000. She also found that the vendors had mitigated their loss by re-leasing the Property at a reasonable rate and by advising the developer community it was back on the market. As well, in her view, 642947 and Burnac had not shown that the vendors had breached their duty to mitigate. Having made these factual findings, the trial judge chose the date of closing to assess Fleischer and Newton's damages. She therefore awarded them $870,000 (the difference between the purchase price and the value of the Property on December 7, 1990) plus pre-judgment interest on that amount at 8.8 per cent, the rate provided by the Courts of Justice Act, R.S.O. 1990, c. C.43. She rejected Fleischer and Newton's request for compound interest, holding that they did not satisfy the requirements in Claiborne Industries Ltd. v. National Bank of Canada (1989), 69 O.R. (2d) 65, 59 D.L.R. (4th) 533 (C.A.) or

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Brock v. Cole (1983), 40 O.R. (2d) 97, 142 D.L.R. (3d) 461 (C.A.).

[23] Finally, the trial judge dealt with 642947 and Burnac's third party claim for indemnity based on Sweet Dream's undertaking. She held that the undertaking should be enforced because its non-performance is a contempt of court. She concluded, at p. 297 R.P.R., that the damages she assessed, $870,000, "flow from the undertaking given by Sweet Dreams". She also concluded that Halasi and Krauss were liable on Sweet Dreams' undertaking because they "were the alter ego of Sweet Dreams and knew when the undertaking was given that Sweet Dreams had no assets from which to pay damages". In her view, the undertaking was fraudulent and Halasi and Krauss misconducted themselves by offering it to the court. She thus considered it appropriate to pierce the corporate veil and hold Halasi, Krauss and Sweet Dreams jointly and severally liable both to 642947 and to Burnac, which she found was a party to the injunction. She fixed their liability at $770,000 (the amount of damages awarded to Fleischer and Newton less the deposit) together with pre-judgment interest.

[ANALYSIS]

[24] I turn now to the three sets of appeals.

I. The Appeal by 642947 and Burnac

[25] On their appeal, 642947 and Burnac sought to avoid their liability to the vendors Fleischer and Newton. Their counsel, Mr. Carr, advanced two arguments why Burnac should not be liable and two arguments why neither Burnac nor 642947 should be liable. These arguments were:

1. Burnac was entitled to rely on the sealed contract rule that an undisclosed principal cannot be sued on a contract made under seal.

2. Fleischer and Newton elected to contract with the agent 642947 and are therefore precluded from suing the principal Burnac;

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3. 642947 and Burnac are not liable because Fleischer and Newton acted in bad faith; and

4. 642947 and Burnac are not liable because Fleischer and Newton could not give vacant possession on closing, as required by the second agreement.

[26] We found no merit in any of these arguments and therefore did not ask counsel for Fleischer and Newton to respond to them. I will briefly give my reasons for dismissing 642947 and Burnac's appeal.

1. The sealed contract argument

[27] In Friedmann Equity Developments Inc. v. Final Note Ltd., [2000] 1 S.C.R. 842, 188 D.L.R. (4th) 269, the Supreme Court of Canada affirmed the continuing validity of the sealed contract rule. This rule holds that where a contract is made under seal, only the parties to the contract may sue or be sued on it. Therefore, an undisclosed principal is not liable on a sealed contract. This rule is an exception to the general rule that a principal, whether disclosed or not, may sue or be sued on a contract made on its behalf by the principal's agent.

[28] The trial judge found that when it entered into both agreements with Fleischer and Newton, 642947 acted as Burnac's agent. And Burnac was an undisclosed principal when the agreements were signed. Although the first agreement was made under seal, the second agreement was not. Yet the second agreement was the subject of the litigation.

[29] Burnac still contends that it is entitled to invoke the sealed contract rule for the second agreement for two reasons: 642947 intended to execute it under seal and the court should give effect to that intention; and s. 13(1) of the Land Registration Reform Act, R.S.O. 1990, c. L.4. Neither contention has merit.

[30] Mr. Handiak, the sole director and shareholder of 642947, testified that his standard practice was to seal all

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agreements of purchase and sale. He did seal the first agreement and, though he intended to seal the second, he failed to do so. In my view, Mr. Handiak's mere intention, unaccompanied by any act of sealing, is insufficient to bring the sealed contract rule into play. The rule, at once historical and technical, should not be given any wider effect than necessary. To invoke it, more than an agent's intention is required. That intention must be accompanied by the deliberate application of the seal. See Friedmann Equity at p. 867 S.C.R.

[31] Section 13(1) of the Land Registration Reform Act treats all conveyances and charges (or mortgages) as sealed documents for all purposes, including the application of the sealed contract rule. Section 13(1) reads:

> 13(1) Despite any statute or rule of law, a transfer or other document transferring an interest in land, a charge or discharge need not be executed under seal by any person, and such a document that is not executed under seal has the same effect for all purposes as if executed under seal.

Burnac submits that the second agreement of purchase and sale is a "charge" under s. 13(1) because 642947 was entitled to a purchaser's lien to the extent of the $100,000 deposit. To come under s. 13(1), however, the charge must be created by a document. That is consistent with the wording of the subsection and its purpose, which "is to preserve the common law substantive consequences associated with traditional forms of conveyancing and mortgages". See Friedmann Equity at p. 869 S.C.R. The purchaser's lien for deposit money is not a charge created by a document but a charge created by equity. It is an equitable charge on land, not included in s. 13(1). And even if it was, in this case any existing purchaser's lien ended when 642947 and Burnac wrongfully repudiated the agreement. For these reasons, the second agreement was not made or deemed to be made under seal and Burnac could be sued on it. This first ground of appeal fails.

2. Fleischer and Newton's election

[32] Assuming the second agreement of purchase and sale was

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not sealed, Burnac advanced an alternative reason why it was not liable. It submitted that Fleischer and Newton chose to contract with 642947 knowing that it was a nominee for an undisclosed principal. Having elected to so contract, Fleischer and Newton cannot now look to hold the principal Burnac liable.

[33] This submission has an air of unreality to it. At trial, Burnac's main contention was that the trust agreement between it and 642947 applied only to the first agreement but not the second and, therefore, 642947 entered into the second agreement as principal, not agent. The trial judge rejected that contention, finding that the trust agreement applied to both agreements of purchase and sale. That finding is not challenged on appeal.

[34] Instead, Burnac now tries to mount an estoppel or election argument. But I see no basis for precluding Fleischer and Newton from suing Burnac simply because they contracted with 642947. To the contrary, had Burnac wished to limit its liability it could have insisted on a clause to that effect in the agreements of purchase and sale.

[35] 642947 was a bare trustee under its trust agreement with Burnac. But as Morden J.A. pointed out in Trident Holdings Ltd. v. Danand Investments Ltd. (1988), 64 O.R. (2d) 65, 49 D.L.R. (4th) 1 (C.A.), in many cases, a bare trustee will also be an agent, and when it contracts on behalf of a principal, the principal may be liable for breach of the contract. Here, 642947 was undoubtedly an agent for Burnac in executing the second agreement of purchase and sale. Under the trust agreement, 642947 had no independent power, responsibility or discretion; it acted only on the instructions of Burnac. It was not so much carrying out the terms of the trust as it was doing Burnac's bidding. In short, 642947 was an agent for Burnac and the agency relationship predominated over the trust relationship. Because the agency relationship predominated, the agent's principal Burnac, though not disclosed and not a party to the second agreement, is still liable for the agreement's breach. Holding Burnac liable simply gives effect to the proposition that though an agent negotiates and signs a contract with a third party, the contract remains one between

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the principal and the third party. Fleischer and Newton were therefore not estopped from suing Burnac for breach of the second agreement of purchase and sale.

3. Bad faith

[36] 642947 and Burnac argued that the vendors Fleischer and Newton should not be allowed to enforce the second agreement because they acted in bad faith. 642947 and Burnac gave two examples of the vendors' alleged bad faith: failing to submit the second agreement to Sweet Dreams under its right of first refusal, and then negotiating to sell the Property to Sweet Dreams while contractually obligated to 642947. Neither example evidences bad faith.

[37] The trial judge held correctly that Sweet Dreams' right of first refusal was spent once it was exercised in connection with the first agreement. Therefore, Fleischer and Newton were not obliged to give Sweet Dreams an opportunity to exercise the right of first refusal in connection with the second agreement. Moreover, it hardly lies in the mouth of 642947 or Burnac to complain about the vendors' failure to submit the right of first refusal to Sweet Dreams, because 642947 signed the waiver notice.

[38] Burnac and 642947 argued that Fleischer and Newton exhibited bad faith at the injunction proceedings by offering to sell the Property to Sweet Dreams despite their agreement with 642947. Both the motions judge and the trial judge implicitly rejected this argument by concluding that Fleischer and Newton took a neutral position. The vendors were willing to sell the Property to whichever party was entitled to buy it. Their stance does not show bad faith.

4. Inability to give vacant possession on closing

[39] 642947 and Burnac also claimed that Fleischer and Newton could not give vacant possession on closing because of Sweet Dreams' lease. Two obvious answers to this claim are: first, 642947 waived tender, thus making it unnecessary for the vendors to show their ability to complete the transaction in

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accordance with its terms; and second, on the injunction application Burnac, though aware of the lease, represented that it was ready, willing and able to close and asked for an extension of time to do so. The existence of the lease was never an impediment to closing the transaction.

II. The Cross-Appeal by Fleischer and Newton

[40] On their cross-appeal, Fleischer and Newton contended that the trial judge's damages award did not fully compensate them for their loss. Their main submission was that the trial judge erred by assessing damages in a falling market at the date of closing instead of at or near the date of trial. Their other submission was that the trial judge erred in awarding pre-judgment interest and post-judgment interest at the statutory rate instead of at the commercial rate.

1. The date for assessment of damages

[41] The judgment of Morden J.A. in 100 Main Street Ltd. v. W.B. Sullivan Construction Ltd. (1978), 20 O.R. (2d) 401, 88 D.L.R. (3d) 1 (C.A.) is the principal authority in this court on the assessment of damages for breach of an agreement of purchase and sale. In that case, the purchaser agreed to buy an apartment building but repudiated the contract before closing. The vendor sued for damages and both the trial judge and this court held the purchaser liable. The main issue in this court was when the damages should have been assessed. At the risk of doing a disservice to the thorough and thoughtful reasons of my colleague, I summarize what he wrote about the choice of the date for assessing damages for breach of an agreement to buy land in the following six propositions, which are relevant to this appeal:

(1) The basic principle for assessing damages for breach of contract applies: the award of damages should put the injured party as nearly as possible in the position it would have been in had the contract been performed.

(2) Ordinarily courts give effect to this principle by assessing damages at the date the contract was to be

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performed, the date of closing. [See Note 1 at end of document]

(3) The court, however, may choose a date different from the date of closing depending on the context. Three important contextual considerations are the plaintiff's duty to take reasonable steps to avoid its loss, the nature of the property and the nature of the market.

(4) Assessing damages at the date of closing may not fairly compensate an innocent vendor who makes reasonable efforts to resell in a falling market. In some cases, the nature of the property -- for example an apartment building -- hampers the vendor's ability to resell quickly. Thus, if the vendor takes reasonable steps to sell from the date of breach and resells the property in some reasonable time after the breach, the court may award the vendor damages equal to the difference between the contract price and the resale price, instead of the difference between the contract price and the fair market value on the date of closing.

(5) Therefore, as a general rule, in a falling market the court should award the vendor damages equal to the difference between the contract price and the "highest price obtainable within a reasonable time after the contractual date for completion following the making of reasonable efforts to sell the property commencing on that date" (at p. 421 O.R.).

(6) Where, however, the vendor retains the property in order to speculate on the market, damages will be assessed at the date of closing.

[42] Underlying these propositions is the simple notion of fairness. As Professor S.M. Waddams wrote in his text, The Law of Contracts, 4th ed. (Toronto: Canada Law Book, 1999), at p. 518, "[i]t is on general considerations of justice, therefore, that the choice of date must depend." The date for the assessment of damages is determined by what is fair on the facts of each case. See Rice v. Rawluk (1992), 8 O.R. (3d) 696

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(Gen. Div.); Bitton v. Jakovljevic (1990), 75 O.R. (2d) 143, 13 R.P.R. (2d) 48 (H.C.J.).

[43] With these propositions in mind, I turn to Fleischer and Newton's submission that on the trial judge's factual findings, she should have chosen November 1994 instead of December 7, 1990, the date of closing, to assess the vendors' damages. The trial judge found that the Property was worth $1,130,000 on December 7, 1990 but only $410,000 in November 1994. She also found that Fleischer and Newton had fulfilled their duty to mitigate by re-leasing the Property and by letting the development community know that it was again on the market. Having made these findings, the trial judge still chose the date of closing to assess the vendors' damages. In my view, she was correct to do so.

[44] The vendors led no evidence about the "highest price obtainable in a reasonable time" after the closing date. They cannot pick a date at random, nearly four years after the closing date, when the market was likely at its lowest, and reasonably expect the court to choose that date to measure their loss. Even the trial judge's finding that Fleischer and Newton initially met their duty to mitigate must be viewed in the context of what occurred subsequently. The trial was ongoing in July 1996, five and one-half years after the scheduled closing date, yet Fleischer and Newton still owned the Property. Although they may not have been able to sell the Property immediately after 642947 repudiated the second agreement, one might reasonably have expected them to have sold it by the time of trial if they seriously intended to do so. Indeed, they leased the Property to a new tenant for a period that could extend to 2006, a period that even they acknowledged was an impediment to a resale. I think the irresistible i nference is that, at some point after the fall of the market in 1990, Fleischer and Newton decided to retain the Property, speculating that eventually the real estate market would go back up. Having decided to do so, they alone must assume the burden or the benefit of changes in the market after the closing date. Fairness dictated that the vendors' damages be assessed at December 1990. I therefore do not accept Fleischer and Newton's main submission that the trial judge erred by

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failing to assess damages as of November 1994.

[45] Their alternative submission that the trial judge should have awarded both pre-judgment interest and post-judgment interest at the commercial rate of interest instead of the rate under the Courts of Justice Act was not pressed in oral argument. I see no error in the trial judge's award of interest. Indeed, the pre-judgment interest rate of 8.8 per cent awarded by the trial judge seems reasonable. For these reasons, I would dismiss the cross-appeal of Fleischer and Newton.

III. The Appeal by Sweet Dreams, Halasi and Krauss

[46] The trial judge found that Sweet Dreams was liable on its undertaking for the loss sustained by 642947 and Burnac, and she then found that Sweet Dreams' principals, Halasi and Krauss, were jointly and severally liable for the loss because Sweet Dreams had no assets and was simply their alter ego. Sweet Dreams, Halasi and Krauss each appealed these findings. Sweet Dreams argued that it cannot be held responsible principally because the injunction did not cause 642947 and Burnac's loss. Halasi and Krauss argued that even if Sweet Dreams is held responsible, they cannot be held liable personally because no grounds existed to pierce the corporate veil.

1. Is Sweet Dreams liable on its undertaking?

[47] The trial judge conducted an inquiry into the liability of Sweet Dreams and its principals Halasi and Krauss under paras. 3 and 4 of Dunnet J.'s order, which provided:

> 3. THIS COURT ORDERS that the inquiry as to the entitlement of the Defendants, 642947 Ontario Limited, Jules Fleischer and Melvin Newton to damages pursuant to the undertaking of the Plaintiff, Sweet Dreams Delights Inc., made in the Order of The Honourable Mr. Justice Isaac is adjourned sine die.
>
> 4. THIS COURT ORDERS that the issue as to whether or not the undertaking of the Plaintiff Sweet Dreams Delights Inc.

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may be imposed on the Plaintiff Paradox Developments Inc. and the principals of Sweet Dreams Delights Inc. may be considered on the inquiry as to damages, if any, or other proceedings. The issue as to whether or not the undertaking can be extended to the Defendants, Andrew Federer, Lakeburn Land Capital Corporation and Burnac Corporation was not raised when the motion was argued on November 22, 1990. This issue may also be considered on the inquiry as to damages, if any, or other proceedings.

An inquiry was unquestionably called for. The basis for Sweet Dreams' injunction -- that it was denied an opportunity to exercise its right of first refusal under the second agreement -- was, as the trial judge found, devoid of merit. Having obtained the injunction, Sweet Dreams sought its dissolution only when the market fell and the Property was no longer attractive.

[48] Sweet Dreams, however, argued two grounds why it should not be liable on its undertaking. First, it submitted that it can be liable only if the injunction caused 642947 and Burnac's loss and it contended that the injunction did not do so. Second, Sweet Dreams submitted that 642947 and Burnac cannot look to the undertaking when they voluntarily relinquished a valid ground not to complete the transaction, the inability of the vendors to give vacant possession on closing.

[49] This latter submission has no merit. Admittedly, one of the conditions of closing required Fleischer and Newton to give vacant possession. But no party to the dispute ever took this condition seriously, and the trial judge rightly found that the failure to satisfy this condition would not have prevented the closing.

[50] I therefore turn to the question whether the damages that 642947 and Burnac have to pay Fleischer and Newton flow from the injunction. Many cases have stated the principle that damages for an injunction wrongly granted should be assessed on the same basis as damages for breach of contract. This principle was affirmed by the House of Lords in F. Hoffmann-LaRoche & Co. A.G. v. Secretary of State for Trade and

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Industry, [1975] A.C. 295 at p. 361, [1974] 2 All E.R. 1128 (H.L.), where Lord Diplock said:

> The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit. It retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so, but if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contra ct between the plaintiff and the defendant that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction: see Smith v. Day (1882), 21 Ch.D. 421, per Brett L.J., at p. 427.

(Emphasis added)

See also Village Gate Resorts Ltd. v. Moore (1999), 71 B.C.L.R. (3d) 1, 37 C.P.C. (4th) 5 (C.A.) and Vieweger Construction Co. v. Rush Tompkins Construction Ltd. (1964), [1965] S.C.R. 195, 48 D.L.R. (2d) 509.

[51] I accept that contract principles apply to the assessment of damages, but it seems to me that, in Ontario, the wording of rule 40.03 focuses more precisely on causation. Rule 40.03 provides:

> 40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning

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damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

The undertaking by Halasi for Sweet Dreams tracks the wording of rule 40.03. Thus, Sweet Dreams undertook "to abide by any Order concerning damages that the Court may make if it ultimately appears that the granting of the Order has caused damage to the responding party for which the Applicant ought to compensate it".

[52] Sweet Dreams is liable on its undertaking if the injunction caused the damages that 642947 and Burnac must pay to the vendors, or, assuming more than one cause, if the injunction materially contributed to these damages. In my view, the trial judge erred in finding a causal connection. Although I think little of the conduct of Sweet Dreams and its principals, I cannot see how the injunction caused or materially contributed to the damages 642947 and Burnac must pay to Fleischer and Newton. These damages were caused by the fall in the real estate market and by Burnac's deliberate refusal to close the transaction, after having asked the motions judge to extend the closing date to preserve its interest in the Property.

[53] The injunction and its later dissolution gave rise to at least three possible scenarios. First, whether asked to or not, the motions judge could have refused to extend the closing date. On this scenario, the injunction would have caused the loss of 642947's bargain with Fleischer and Newton, and Sweet Dreams could have been liable on its undertaking for that loss. A second possibility is that the motions judge could have extended the closing date as requested by Burnac, and 642947 could then have closed the transaction on the extended date. On this scenario, Fleischer and Newton would not have suffered any damages and Burnac would have acquired the Property it agreed to buy at the price it agreed to pay. But the injunction would have caused an approximately one-year delay in the closing (from November 24, 1989 to December 7, 1990). Sweet Dreams would therefore be liable to 642947 and Burnac for any damages

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attributable to the delay. These damages could have included increased carrying costs, loss of re ntal income or even loss of profits.

[54] The third scenario is the one that occurred. The motions judge extended the closing as requested by Burnac but then 642947 refused to close. On this scenario, the injunction caused none of the damages that 642947 and Burnac have been ordered to pay. Instead, these damages were caused by the combination of the fall in the real estate market and 642947's refusal to close. That this must be so can be seen by considering the position of 642947 and Burnac had the injunction not been granted. In that case, 642947 would have paid Fleischer and Newton $2,000,000 for the Property in 1989 and a year later would have been left with a Property worth only $1,130,000. Although Fleischer and Newton would have been paid the contract price, Burnac would still have suffered the same loss, a loss caused solely by the fall in the market.

[55] I therefore conclude that, on causation principles, 642947 and Burnac's claim to be indemnified by Sweet Dreams must fail. Some authorities, however, have suggested that in assessing damages for the wrongful granting of an injunction, a court is not limited by contract law principles but has a wider equitable discretion to do what is "fair and reasonable" or what is "just" in all the circumstances. See Air Express Ltd. v. Ansett Transportation Industries (Operations) Pty Ltd. (1979 to 1981), 146 C.L.R. 249, 33 A.L.R. 578; Village Gate Resorts, supra; I.C.F. Spry, The Principles of Equitable Remedies, 5th ed. (Toronto: Carswell, 1997) at p. 660.

[56] These other authorities address the extent to which damages under an undertaking must conform to the general law applicable to contract damages. They suggest that a judge awarding damages under an undertaking has some discretion to depart from contract damages principles, particularly on the issue of remoteness. None of these authorities states that damages may be awarded when a causal link between the undertaking and the loss is entirely absent. Indeed, each affirms the necessity of establishing factual causation to obtain damages under an undertaking.

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[57] Even assuming that a wide discretion to order damages in the absence of a causal connection does exist in some jurisdictions, I doubt that an Ontario court could invoke it in the face of the wording of rule 40.03, which focuses the inquiry on causation. And even if an Ontario court could award damages that seem fair or just, I am not persuaded that this is the right case to do so. In asking for an extension of the closing date, Burnac gambled that the value of the Property would stay the same or go up. When its gamble did not pay off, Burnac reneged on its bargain. It cannot now look to Sweet Dreams to relieve it from the consequences of its own default. That would not be a just result. Therefore, I would set aside the trial judge's order that Sweet Dreams indemnify 642947 and Burnac for their loss.

2. Are Halasi and Krauss personally liable?

[58] Halasi and Krauss' liability depended on finding Sweet Dreams liable on its undertaking. Because 642947 and Burnac's claim against Sweet Dreams failed, so must their claim against the two principals of Sweet Dreams. Nonetheless, I propose to discuss the liability of Halasi and Krauss on the footing that Sweet Dreams was responsible for Burnac's loss. I do so because the issue was fully argued before us and because I consider it relevant to the question of costs.

[59] Halasi and Krauss put forward three reasons why they should not have been held jointly and severally responsible for the damages Burnac and 642947 were ordered to pay Fleischer and Newton. First, they submitted that the trial judge erred in finding Sweet Dreams had insufficient assets to honour its undertaking if called on to pay. Second, they submitted that the adequacy of Sweet Dreams' assets should have been raised by 642947 and Burnac on the injunction application. And, third, they submitted that the trial judge erred in piercing the corporate veil to hold them responsible.

[60] The trial judge found that, when its undertaking was given, Sweet Dreams had no assets from which to pay damages. Halasi and Krauss submitted that this finding cannot be

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supported on the evidence. I disagree. Sweet Dreams was used by Halasi and Krauss solely to hold their interest and their investors' interest in the property. It had no other purpose. It had no income other than the rent it received on a sublease, a rent that was insufficient to pay its own rent to Fleischer and Newton. It had no assets other than the lease itself. Some evidence of the value of the lease, including the right of first refusal, is found in the offer made by Halasi and Krauss to sell the Property to Burnac for $50,000 more than the contract price. Even if that figure is not an accurate estimate of the lease's value, the lease alone was inadequate to protect 642947 and Burnac from any damages they may have sustained because of the injunction. Sweet Deams simply had no cash or liquid assets to honour its undertaking.

[61] Thus, the trial judge's finding that Sweet Dreams did not have sufficient assets to pay a damages award is amply supported by the evidence. Indeed, Halasi admitted as much when cross-examined on his affidavit in support of the injunction. Hard cases may arise where the ability of a party to pay damages for an injunction wrongly granted may not be obvious. This is not one of those cases.

[62] Even if Sweet Dreams did not have any assets to pay a damages award, Halasi and Krauss contended that the adequacy of its assets should have been raised by Burnac on the injunction application, and that Burnac cannot, after the fact, extract what amounted to personal guarantees. Halasi and Krauss say that the adequacy of Sweet Dreams' assets was relevant to the balance of convenience. If [it was] raised during the hearing, Sweet Dreams could have decided whether to proceed with its injunction application and, if it did, the court could have decided whether to require security or personal guarantees as a condition of granting the injunction. In substance, Halasi and Krauss' submission puts the onus on the party seeking the undertaking -- here 642947 and Burnac -- to raise the adequacy of the assets of the party giving the undertaking.

[63] I do not accept this submission. I agree that on the injunction application Burnac could have questioned the sufficiency of Sweet Dreams' assets. But Sweet Dreams itself

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had the primary obligation to disclose that its assets were inadequate to satisfy its undertaking if called on to pay. The undertaking was not given to 642947 and Burnac. It was given to the court. By undertaking to "abide by any Order concerning damages that the Court may make", Sweet Dreams implicitly represented that it had sufficient assets to honour that undertaking. Both the court and Burnac were entitled to rely on that representation without making inquiries into its accuracy. If, as was the case here, Sweet Dreams did not have sufficient assets to honour its undertaking, it had an obligation to disclose that fact to the court. Sweet Dreams could then have asked to be relieved of its undertaking, or could have been asked to post security.

[64] Even so, Halasi and Krauss argued that the trial judge erred in law in going behind Sweet Dreams to hold them personally liable. In piercing the corporate veil and imposing personal liability, the trial judge held that Halasi and Krauss used Sweet Dreams as their alter ego and knew when the undertaking was given that Sweet Dreams had no assets from which to pay damages. She therefore concluded, at p. 297 R.P.R., that "the undertaking was fraudulent and it was misconduct on the part of Krauss and Halasi as officers of Sweet Dreams to offer it to the Court."

[65] Halasi and Krauss argued that the trial judge's reasoning reflects two errors: Sweet Dreams was not their alter ego, indeed, they were not even shareholders of Sweet Dreams; and the corporate veil should not have been pierced because Halasi and Krauss incorporated Sweet Dreams for a valid purpose -- to hold property -- and did not use the company as a sham to perpetrate a fraud.

[66] The first argument is specious. Halasi and Krauss, through companies they owned or controlled, each held 40 per cent of the shares of Sweet Dreams. They described themselves as "partners" in trying to assemble land in the North York corridor. Whatever the legal form, they controlled Sweet Dreams and the interest it held in the property. The trial judge's finding (at p. 298 R.P.R.) that "Sweet Dreams was merely the alter ego of both Halasi and Krauss" was open to her on this

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evidence and I would not interfere with it.

[67] Halasi and Krauss' second argument is that the trial judge disregarded well-known principles of corporate law in holding them personally liable. In my opinion, however, the trial judge took the correct view in concluding (at p. 298 R.P.R.) that "Krauss and Halasi cannot hide behind the corporate veil." To pierce the corporate veil is to disregard the separate legal personality of a corporation, a fundamental principle of corporate law recognized in Salomon v. Salomon & Co., [1897] A.C. 22, [1895-9] All E.R. Rep. 33. Only exceptional cases -- cases where applying the Salomon principle would be "flagrantly" unjust -- warrant going behind the company and imposing personal liability. Thus, in Clarkson Co. v. Zhelka, [1967] 2 O.R. 565 at p. 578, 64 D.L.R. (2d) 457 (H.C.J.), Thompson J. held that instances in which the corporate veil has been pierced "represent refusals to apply the logic of the Salomon case where it would be flagrantly opposed to justice". Similar ly, Wilson J. observed in Kosmopoulos v. Constitution Insurance Co., [1987] 1 S.C.R. 2 at p. 10, 34 D.L.R. (4th) 208, that the law on when the corporate veil can be pierced "follows no consistent principle. The best that can be said is that the 'separate entities' principle is not enforced when it would yield a result 'too flagrantly opposed to justice, convenience or the intersts of the Revenue': L.C.B. Gower, Modern Company Law (4th ed. 1979), at p. 112".

[68] Typically, the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated "those in control expressly direct a wrongful thing to be done": Clarkson Co. v. Zhelka at p. 578. Sharpe J. set out a useful statement of the guiding principle in Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1996), 28 O.R. (3d) 423 at pp. 433-34 (Gen. Div.), affd [1997] O.J. No. 3754 (C.A.): "the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct."

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[69] These authorities indicate that the decision to pierce the corporate veil will depend on the context. They also indicate that the separate legal personality of the corporation cannot be lightly set aside. Yet, however restrictive corporate law principles for piercing the corporate veil may be, in the context of an undertaking to the court, the trial judge's findings support going behind Sweet Dreams and imposing personal liability.

[70] She found that Sweet Dreams had no assets to honour its undertaking, that Halasi and Krauss controlled Sweet Dreams and that when Halasi and Krauss tendered the undertaking for Sweet Dreams they knew it had no assets. All of these findings are reasonably supported by the evidence. Moreover, Halasi was a sophisticated developer and Krauss was a lawyer. They tendered an undertaking to the court, which they knew was worthless, to gain an advantage. When called on to honour the undertaking, they tried to hide behind a shell company, which they controlled, to escape liability. In the words of Sharpe J. in Transamerica Life, Sweet Dreams was "completely dominated and controlled" by Halasi and Krauss, and used by them "as a shield for . . . improper conduct". The trial judge put it this way (at p. 298 R.P.R.), in a passage that I endorse:

> Undertakings cannot be lightly given to the Court to selfishly protect the self-interest of the parties giving the undertaking. It would be a mockery of injunction proceedings if that were so. It would effectively mean that worthless hollow undertakings could be given to the Court, leaving the Court powerless to grant effective sanctions by way of damages which, in the final analysis, could never be collected by the injured party.

Had I upheld the trial judge's finding that Sweet Dreams was liable on its undertaking, I would have also upheld her finding that Halasi and Krauss were liable.

[71] But as I said at the outset of this discussion, Halasi and Krauss could be held liable only if Sweet Dreams were liable. Because Burnac and 642947 could not show a causal connection between the injunction and the damages they

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suffered, they cannot look to Sweet Dreams and therefore to Halasi and Krauss for indemnification. I would therefore allow the appeal by Sweet Dreams, Halasi and Krauss and dismiss the third party claim against them.

[72] I would, however, deprive them of their costs both at trial and on appeal. The trial judge took a dim view of their conduct and so do I. Indeed, in the dispute between 642947 and Burnac on the one side, and Sweet Dreams, Halasi and Krauss on the other, neither occupies the moral high ground. 642947 and Burnac refused to honour their bargain; Sweet Dreams, Halasi and Krauss exercised a right -- the right of first refusal -- that was spent after the first agreement in order to obtain the injunction. At the hearing of the injunction, they told the motions judge that they were willing to buy the Property for $2,000,000. Then they too abandoned the Property and the injunction when the market fell. Burnac and 642947 must bear full responsibility for the vendors' loss. Although Sweet Dreams, Halasi and Krauss have been successful, because of their conduct I would not award them any costs.

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DISPOSITION

[73] For the reasons I have given, I would dismiss both the appeal by Burnac and 642947 and the cross-appeal by Fleischer and Newton with costs. I would allow the appeal by Sweet Dreams, Halasi and Krauss without costs. I would therefore set aside paras. 5 and 6 of the judgment of Greer J. and in their place would order that the claim of 642947 and Burnac against Sweet Dreams, Halasi and Krauss be dismissed but without costs. I am grateful to all counsel for their assistance on these appeals.

Order accordingly.

Notes

Note 1: These damages may be reduced in a case where the plaintiff accepts the defendant's repudiation before closing and the defendant shows that the plaintiff failed to mitigate its loss in the period between the acceptance of the repudiation and

the scheduled closing date.

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Tab E

Docket: 2009-3604(IT)G

BETWEEN:

SALVATORE PERAGINE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

2012 TCC 348 (CanLII)

Appeal heard on November 23, 2011 and September 24, 2012,
at Hamilton, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant:	David M. Piccolo
Counsel for the Respondent:	Erin Strashin

JUDGMENT

The Appellant's appeal from the reassessment issued in relation to his 2003 taxation year is allowed, with costs, and this reassessment is vacated.

Signed at Ottawa, Canada, this 4th day of October, 2012.

"Wyman W. Webb"

Webb J.

Citation: 2012TCC348
Date: 20121004
Docket: 2009-3604(IT)G

2012 TCC 348 (CanLII)

BETWEEN:

SALVATORE PERAGINE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The Appellant was reassessed after the expiration of his normal reassessment period for his 2003 taxation year to increase the amount of his taxable gain for 2003. The Appellant had reported a taxable capital gain of $8,500 in his tax return for 2003 and the Appellant was reassessed to increase this taxable capital gain by $92,874. Both parties submit that the Appellant's tax return that he had filed for 2003 was not correct. The Appellant submitted that no amount should have been reported as a taxable capital gain and the Respondent submitted that the taxable capital gain that the Appellant should have reported should have been $101,374 and not $8,500.

[2] The taxable capital gain in issue arose as a result of the disposition of the property located at 4057 Victoria Avenue, Niagara Falls, Ontario (the "Victoria Property"). The issue in this appeal is whether the Appellant was a bare trustee for the Victoria Property. If the Appellant was the bare trustee of the Victoria Property, the taxable capital gain realized on the sale of the property would not be the Appellant's taxable capital gain for the purposes of the *Income Tax Act* (the "*Act*"). Such taxable capital gain would instead be the taxable capital gain of the beneficial owner[1] of the property. The position of the Respondent is that the Appellant was the legal and beneficial owner of the Victoria Property.

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[1] *De Mond* v. *The Queen*, [1999] 4 C.T.C. 2007, 99 DTC 893.

[3] Then Chief Justice Bowman in *Mensah* v. *The Queen,* [2008] T.C.J. No. 302, 2008 DTC 4358 stated that:

> 8 The fourth preliminary point is that the assessment for the 1993 taxation year is statute-barred. The onus is upon the Minister to establish the facts justifying the reassessment of the 1993 taxation year beyond the normal reassessment period. The provisions of the *Income Tax Act* permitting the Minister to open up statute-barred years have evolved and the evolution was summarized in *943372 Ontario Inc. v. R.*, 2007 D.T.C. 1051; [2007] 5 C.T.C. 2001 at paragraph 18:
>
> > 18 The evolution of these provisions can be briefly summarized as follows: originally, subsection 152(4) permitted the Minister to open up a statute-barred year for all purposes if he could find any misrepresentation of the type described in subsection 152(4), however small, and reassess any items whether the subject of any type of misrepresentation or not. This obviously appeared somewhat unfair and the result was paragraph 152(5)(*b*) which was introduced in 1973-1974 with effect from 1972. This provision permitted the taxpayer to establish that the omission of an amount of income was not the result of a misrepresentation that was attributable to neglect, carelessness, wilful default or fraud. Nonetheless it did cast on the taxpayer an onus. Subsection 152(4.01) was therefore introduced and ***its effect, according to Mr. Kutkevicius, is to remove that onus from the taxpayer and put a two-fold onus on the Minister to establish:***
> >
> > (a) ***that there was misrepresentation, and***
> >
> > ***(a) that the misrepresentation was attributable to neglect, carelessness, wilful default or fraud.***
>
> ***I think this is the correct interpretation.*** If the onus that was imposed on the taxpayer under former paragraph 152(5)(*b*) survived the amendment to subsection 152(5) and the enactment of subsection 152(4.01), subsection (4.01) would have no purpose.
>
> (emphasis added)

[4] Therefore the onus was on the Respondent to not only establish that there was a misrepresentation with respect to the failure of the Appellant to include the additional amount of $92,874 as a taxable capital gain as a result of disposing of the Victoria Property, but also that the "misrepresentation was attributable to neglect, carelessness, wilful default or fraud".

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[5] In *Nesbitt* v. *The Queen*, 96 DTC 6588, Justice Strayer, on behalf of the Federal Court of Appeal, stated that:

> 8 Even assuming that the letter of August 6, 1986, could be taken to prove the Minister's knowledge by that date (two months prior to expiry of the four-year limitation period) of the true facts and that there had been a misrepresentation, I do not believe this assists the appellant. It appears to me that one purpose of subsection 152(4) is to promote careful and accurate completion of income tax returns. Whether or not there is misrepresentation through neglect or carelessness in the completion of a return is determinable at the time the return is filed. ***A misrepresentation has occurred if there is an incorrect statement on the return form, at least one that is material to the purposes of the return and to any future reassessment***. ...
>
> (emphasis added)

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[6] Both parties submit that the statement on the Appellant's income tax return for 2003 was incorrect in relation to the amount reported as a taxable capital gain. In order for the Appellant to be reassessed after the expiration of the normal reassessment period the Respondent will need to establish that the taxable capital gain should have been reported by the Appellant. If the Appellant was only the bare trustee of the Victoria Property there would not be any misrepresentation with respect to the failure to include the additional taxable capital gain as alleged by the Respondent as this additional amount (assuming that it was determined correctly) would not be income of the Appellant.

[7] Both the Appellant and his brother Leo Peragine testified during the hearing. The testimony of both was clear and consistent that the building was acquired for the purposes of Leo Peragine's business (which was being carried on through a numbered company – 1139057 Ontario Inc. (which was carrying on business as Cataract Towing & Recovery ("Cataract Towing"))). Initially Leo Peragine and his brother Angelo Peragine were shareholders in the company but later Leo Peragine bought his brother's interest in the company.

[8] The Victoria Property was acquired in 1998 and title to this property was registered in the name of the Appellant because Leo Peragine would not have qualified for financing at that time. In the Reply it is stated that the purchase price for the Victoria Property was $160,000 and in his tax return for 2003 the Appellant stated that the adjusted cost base of the property was $180,000 (without distinguishing between the land and the building). Although it is not entirely clear, it appears that the source of the money used to purchase the Victoria Property was a mortgage on the Appellant's (and Leo Peragine's) mother's house in Toronto (for

$146,000) and a mortgage on the Victoria Property to Jose Ribeiro and Teresa Ribeiro (for $55,750). Title for the Appellant's (and Leo Peragine's) mother's house was in the Appellant's name and in their mother's name.

[9] It was clear from the testimony of Leo Peragine that all of the payments on the mortgages (prior to the sale of the Victoria Property) were made by Cataract Towing. It is also clear from the testimony of Leo Peragine and the Appellant that the Appellant did not make any of the payments on these mortgages. Cataract Towing would make the payments on the mortgage on Leo Peragine's and the Appellant's mother's house by depositing the required mortgage payment into her bank account before the payment was to be made to Scotiabank.

[10] After the Victoria Property was acquired and before it was sold, the area behind the building was excavated and filled back in with concrete and gravel. Leo Peragine testified that 240 loads of fill were removed and 97 loads of crushed gravel were brought in. As well, the roof and the furnace were replaced and a spray booth for painting cars was installed. These projects required substantial outlays. It is clear that all of these projects were undertaken by Cataract Towing and not the Appellant. The Appellant was not involved in any aspect of any of these projects.

[11] Installing the spray booth required renovations to the building. Financing for the costs of acquiring and installing the spray booth was arranged by London Leasing. At some point Cataract Towing stopped making payments in relation to the financing of the spray booth and since the registered owner of the building was the Appellant, London Leasing contacted the Appellant. At that time the amount remaining to be paid was $12,000 which was to be paid in 15 payments of $800 each. These payments were made by Cataract Towing or Leo Peragine paying $800 to the Appellant each time that such payment was required to be made and by the Appellant then making the $800 payment to 3413331 Canada Inc.

[12] The Amended Direction in relation to the disbursement of the sale proceeds from the sale of the Victoria Property was filed as an Exhibit. This Direction shows that the funds were disbursed as payment of the outstanding mortgage on this property to Jose and Teresa Ribeiro (in the amount of $62,250) and as payment of the balance of the mortgage on the Appellant's mother's property to Scotiabank (in the amount of $133,288). Of particular note is the disbursement of $32,080 to Jose and Teresa Ribeiro which was identified on the Direction as a loan. It was clear from the testimony of Leo Peragine and the Appellant that either Leo Peragine or Cataract Towing had borrowed money from Jose and Teresa Ribeiro in addition to the initial mortgage amount. It is also clear that the Appellant had not arranged the financing

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with Jose and Teresa Ribeiro and that the Appellant had not received the money that Jose and Teresa Ribeiro had advanced. If, as the Respondent contends, the Appellant was the legal and beneficial owner of the Victoria Property, why was $32,080 from the sale proceeds of this property paid to Jose and Teresa Ribeiro as repayment of an unsecured loan that had been advanced to Leo Peragine or Cataract Towing?

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[13] The proceeds from the sale of the Victoria Property were also used to pay outstanding property taxes and legal fees. An amount was also paid to Libra Peragine (the wife of Angelo Peragine). The explanation that was provided for this payment was that it was probably repayment of a loan that Libra Peragine had made to Leo Peragine.

[14] Approximately $95,000 from the proceeds of the sale of the Victoria Property was disbursed to the Appellant. This money was paid by the Appellant to either Leo Peragine or to other persons at the direction of Leo Peragine. Some of the money was used to pay a visa bill. The Appellant did not know whose visa account was being paid. However, since Leo Peragine had told him to make a payment of $4,788 on this particular visa account, the Appellant did so. If the Appellant would have been the legal and beneficial owner of the Victoria Property why would the Appellant have made a payment from the proceeds of sale of this property on an unknown visa account simply because Leo Peragine asked him to do so?

[15] Leo Peragine testified that he had picked up the money from the Appellant within a few days of the closing. The Appellant testified that the money was disbursed in various amounts over a period of time to not only Leo Peragine but to other persons at the direction of Leo Peragine. While the witnesses may not have provided entirely consistent testimony with respect to the persons to whom the money from the closing was disbursed or when it was disbursed, the witnesses were in agreement that the Appellant did not keep any of the money from the sale of the Victoria Property and that all of the proceeds were disbursed to pay outstanding charges against the property or to Leo Peragine or at the direction of Leo Peragine.

[16] Any inconsistency between the testimony of the Appellant and Leo Peragine in relation to the number or timing of disbursements made by the Appellant or whether it was all paid directly to Leo Peragine or partially to him and the balance to other persons at Leo Peragine's direction, is not enough to impeach their credibility. The sale of the Victoria Property occurred in 2003 and it appears that the funds were disbursed in September 2003, which would be nine years ago. Whether an amount is paid directly to a particular person or at that person's direction may be immaterial to that person since that person realizes the benefit from the payment in any event. It is

also clear from the Appellant's bank book that the entire amount was disbursed within 30 days of the closing.

[17] A copy of the Trust Agreement / Declaration of Trust was also introduced at the hearing. This document was dated September 1, 1998 and stated that the Appellant was only a bare trustee of the Victoria Property for the benefit of Leo Peragine and Leo Peragine carrying on business as Cataract Towing. The conduct of the parties in this case was consistent with this document although the document does indicate that Leo Peragine was carrying on his business as a sole proprietor but the business of Cataract Towing and Recovery was actually being carried on by a numbered company. Whether the business was being carried on by Leo Peragine as a sole proprietor or by a numbered company dose not change the status of the Appellant as a bare trustee for the Victoria Property as the document does identify another person (Leo Peragine) as the beneficial owner of the property.

[18] In *De Mond*, above, Justice Lamarre stated as follows:

> 31 This approach has also been followed by the courts, as it has been held that losses incurred in a real estate transaction conducted in the name of a corporation as a bare trustee should be deducted by the person who has an absolute right to the profit. In *Brookview Investments Ltd.* et al v. *Minister of National Revenue* (1963), 63 D.T.C. 1205 (Can. Ex. Ct.), an arrangement had been devised under which a trust was constituted in order to purchase land as a bare trustee. Cattanach J. concluded that the sole function of the trust was to convey the property as directed by the group of investors. He therefore concluded that the investors could deduct the losses incurred due to the real estate transaction, which had turned bad. Cattanach J. affirmed that had a profit been realized, such profit would not have been taxed in the hands of the trust but rather in the hands of the person who had an absolute right to the profit. Mr. W.D. Goodman, in "The Character of the Bare Trust in Canadian Tax Legislation", in D.W. Waters, ed., Equity, Fiduciaries and Trusts (Toronto: Carswell, 1993), at p. 219, made the following comment on Brookview Investments, at p. 233:
>
> > ... Unfortunately, the reasons for judgment do not clearly indicate the legal basis for this decision, but presumably it was based on the view that a bare trust may be totally ignored for tax purposes, so that the property held by the bare trustee and any income or loss flowing from such property had to be regarded as belonging to the beneficiaries of the bare trust.
>
> ...
>
> 34 In "The Character of the Bare Trust in Canadian Tax Legislation", supra, Mr. Goodman referred at page 222 to an article by Professor Hayton in which a bare trust was characterized as not being a true trust. Professor Hayton wrote:

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> If, despite the form of the trust instrument, the trust is a sham, apparently having legal effects, but not really intended to have any legal effect, the settlor having real dispositive control over capital and income, then the trust is not a true trust but a bare trust where the whole equitable ownership remains in the settlor.

However, Mr. Goodman took care to suggest that Professor Hayton's statement should not be interpreted as implying that provisions in the *Act* regarding trusts are inapplicable to bare trusts.

35 In the Corporate Management Tax Conference 1989: "Creative Tax Planning for Real Estate Transactions --- Beyond Tax Reform and into the 1990s", Revenue Canada's view of the bare trust concept is stated as follows at p. 8:1:

> From Revenue Canada's perspective, difficult income tax issues arise from the use of bare trusts for commercial purposes. The reason these issues are difficult is that in order to arrive at apparently equitable tax results, the existence of a trust, which is effective for commercial purposes, has to be ignored for income tax purposes.
>
> Although a bare trust is not defined in the *Income Tax Act*, Revenue Canada generally views this to be a trust under common law where the trustee has no significant powers or responsibilities, and can take no action regarding the property held by the trust without instructions from the settlor. Normally the trustee's only function is to hold legal title to the property. Furthermore, the settlor is also the sole beneficiary and can cause the property to revert to him at any time. Thus a bare trust does not include a blind trust or other trusts in which the trustee has established powers and responsibilities.

36 Aside from the definitions of bare trusts referred to by counsel for the appellant, *supra*, it has also been stated that a bare trustee is a person who holds property in trust at the absolute disposal and for the absolute benefit of the beneficiaries (see Halsbury's Laws of England, 4th ed., volume 48, paragraph 641, and Adams v. R. (1998), 98 D.T.C. 6232 (Fed. C.A.)).

37 Bare trustees have also been compared to agents. The existence of a bare trust will be disregarded for income tax purposes where the bare trustee holds property as a mere agent or for the beneficial owner. In *Trident Holdings Ltd. v. Danand Investments Ltd. (1988)*, 64 O.R. (2d) 65 (Ont. C.A.), Mr. Justice Morden, speaking for the Ontario Court of Appeal, made the distinction between an ordinary trust and a bare trust. He reproduced the following passages from Scott, The Law of Trusts, 4th ed. (1987):

> An agent acts for, and on behalf of, his principal and subject to his control; a trustee as such is not subject to the control of his beneficiary, although he is

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> under a duty to deal with the trust property for the latter's benefit in accordance with the terms of the trust, and can be compelled by the beneficiary to perform this duty. The agent owes a duty of obedience to his principal; a trustee is under a duty to conform to the terms of the trust [Vol. 1, p. 88].
>
> ...
>
> A person may be both agent of and trustee for another. If he undertakes to act on behalf of the other and subject to his control he is an agent; but if he is vested with the title to property that he holds for his principal, he is also a trustee. In such a case, however, it is the agency relation that predominates, and the principles of agency, rather than the principles of trust, are applicable [Vol. 1, p. 95].

38 Mr. Justice Morden also quoted with approval from an article by M.C. Cullity, "Liability of Beneficiaries — A Rejoinder", (1985-86), 7 Estates & Trusts Quarterly 35, at p. 36:

> It is quite clear that in many situations trustees will also be agents. This occurs, for example, in the familiar case of investments held by an investment dealer as nominee or in the case of land held by a nominee corporation. In such cases, the trust relationship that arises by virtue of the separation of legal and equitable ownership is often described as a bare trust and for tax and some other purposes it is quite understandably ignored.
>
> The distinguishing characteristic of the bare trust is that the trustee has no independent powers, discretions or responsibilities. His only responsibility is to carry out the instructions of his principals --- the beneficiaries. If he does not have to accept instructions, if he has any significant independent powers or responsibilities, he is not a bare trustee.

[19] Subsection 104(1) of the *Act* provides as follows:

> 104. (1) In this *Act*, a reference to a trust or estate (in this subdivision referred to as a "trust") shall, unless the context otherwise requires, be read to include a reference to the trustee, executor, administrator, liquidator of a succession, heir or other legal representative having ownership or control of the trust property, but, except for the purposes of this subsection, subsection (1.1), subparagraph (*b*)(v) of the definition "disposition" in subsection 248(1) and paragraph (*k*) of that definition, ***a trust is deemed not to include an arrangement under which the trust can reasonably be considered to act as agent for all the beneficiaries under the trust with respect to all dealings with all of the trust's property*** unless the trust is described in any of paragraphs (*a*) to (*e.1*) of the definition "trust" in subsection 108(1).
>
> (emphasis added)

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[20] It seems to me that the Appellant was simply acting as the agent for Leo Peragine in holding the Victoria Property. The Appellant did not have any beneficial interest in the property nor did the Appellant have any independent power, discretion, or responsibility with respect to the Victoria Property. Therefore the trust would not be a trust as determined in accordance with the provisions of subsection 104(1) of the *Act* and would be what has been described as a bare trust. As a result any gain arising from the sale of the Victoria Property would not be included in the Appellant's income.

[21] As a result the Respondent has failed to establish that the Appellant has made a misrepresentation that would support the reassessment that was issued and therefore the Appellant's appeal is allowed, with costs, and the reassessment issued in relation to the Appellant's 2003 taxation year is vacated.

Signed at Ottawa, Canada, this 4th day of October 2012.

"Wyman W. Webb"

Webb J.

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CITATION:	2012TCC348
COURT FILE NO.:	2009-3604(IT)G
STYLE OF CAUSE:	SALVATORE PERAGINE AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Hamilton, Ontario
DATE OF HEARING:	November 23, 2011 and September 24, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	October 4, 2012

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Court File No. 08-CL-7878

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OF ARRANGEMENT OF UNIVERSAL SETTLEMENTS INTERNATIONAL INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

BRIEF OF AUTHORITIES OF THE APPLICANT, UNIVERSAL SETTLEMENTS INTERNATIONAL INC. (Bare Trust Motion, Returnable March 16, 2016)

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